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Recommendations and Reports

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

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Recommendations and Reports

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CONTENTS

Page

RECOMMENDATIONS and STATEMENTS of the Administrative Conference of the United States

Recommendation 85-1: Legislative Preclusion of Cost/Benefit Analysis 3

Recommendation 85-2: Agency Procedures for Performing Regulatory Analysis of Rules 5

Recommendation 85-3: Coordination of Public and Private Enforcement of Environmental Laws 13

Recommendation 85-4: Administrative Review in Immigration Proceedings 17

Recommendation 85-5: Procedures for Negotiating Proposed Regulations 23

Statement 11: Statement on Hearing Procedures for the Resolution of Scientific Issues 31

BACKGROUND REPORTS for Recommendations and Statements

Rec. 85-1: Alfred S. Neely, IV. *Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis in Administrative Decision Making* 37

Rec. 85-2: Thomas O. McGarity. *The Role of Regulatory Analysis in Regulatory Decisionmaking* 107

Rec. 85-3: Barry B. Boyer and Errol Meidinger. *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws* 365

Rec. 85-4: Stephen H. Legomsky. *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process* 505

Rec. 85-5: Henry H. Perritt, Jr. *Analysis of Four Negotiated Rulemaking Efforts* 637

Stmt. 11: Sidney A. Shapiro. *Scientific Issues and the Function of Hearing Procedures: An Evaluation of FDA's Public Board of Inquiry* 795

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RECOMMENDATIONS OF THE
ADMINISTRATIVE CONFERENCE
OF THE
UNITED STATES

RECOMMENDATION 85-1:

LEGISLATIVE PRECLUSION OF COST/BENEFIT ANALYSIS

Cost/benefit analysis[1] may ordinarily be applied by an agency to a regulatory action, except when Congress has forbidden its use or has specified, in the authorizing legislation, the precise regulatory outcome Congress desired. Any legislative directive short of complete specificity, however, can lead to disputes as to whether Congress intended--or even contemplated--the application of cost/benefit analysis by the agency in the agency's adoption of legislative rules to carry out the program. Disputes about the agency's authority can undermine the regulatory program, and may last for decades, only to be resolved, and then perhaps only temporarily, in a judicial—rather than a legislative—forum. Protracted disputes over an agency's authority to apply cost/benefit analysis can be largely avoided by direct congressional attention to the matter.

RECOMMENDATION

When enacting regulatory legislation, if Congress intends to prohibit the application of cost/benefit analysis by the agency charged with administering the regulatory program, Congress should explicitly so state.

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1. The term "cost/benefit analysis" is used here to include all forms of analysis (cost/benefit, cost effectiveness, risk/benefit, etc.) in which the potential costs, benefits, and risks of a proposed action, along with possible alternative courses of action, are quantified if feasible and appraised in relation to one another. See Recommendation 79-4.

RECOMMENDATION 85-2:

AGENCY PROCEDURES FOR PERFORMING REGULATORY ANALYSIS OF RULES

Since 1974 executive branch agencies have been subject to a series of Presidential executive orders that required agencies to prepare comprehensive impact analyses for major rulemaking proposals. Variously termed "inflation impact statements," "regulatory analyses," and "regulatory impact analyses," these analyses were all designed to identify or measure the costs and benefits of rulemaking options being considered by Federal administrative agencies. Congress also has imposed impact analysis requirements on administrative agencies through the National Environmental Policy Act of 1969, the Regulatory Flexibility Act of 1980, and by amendments to authorizing statutes for particular agencies.

The regulatory analysis function has become increasingly formalized within agencies as a result of the proliferation and durability of these requirements. This Recommendation is based on a Conference study of the ways agencies have incorporated the regulatory analysis function into their decisionmaking process. A general conclusion from this study is that regulatory analysis can be a useful device in rulemaking if it is taken seriously by upper level agency decisionmakers; the regulatory analysis function is effectively integrated into the rulemaking process, and the limitations of regulatory analysis are recognized by those who rely upon it.

The Recommendation contains specific advice on the use and limits of regulatory analysis and on integration of regulatory analysis into the agency rulemaking process. Unless expressly so stated, the Recommendation is not intended to address application of the Freedom of Information Act to agency records used in regulatory analysis. In particular, it is not intended to expand or decrease the statutory protections afforded trade secrets and commercial or financial information obtained for use in regulatory analysis.

RECOMMENDATION

1. The Use of Regulatory Analysis to Identify Options

Regulatory analysis[1] can be most useful to agency decisionmakers in identifying regulatory options if the regulatory analysis function is an integral part of the agency decisionmaking process. To make regulatory analysis a more effective device for identifying options, agencies should adopt the following practices:

a. When an agency begins intensive information-gathering and other analytical efforts on a rule, the agency's technical staff and regulatory analysts should attempt, at an early stage, to identify a broad range of regulatory options.

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[1] The following definitions are used in this recommendation:

"Regulatory analysis" is a comprehensive analysis of the economic, social, and environmental impacts of one or more alternatives for addressing a problem undertaken in connection with an agency rulemaking effort. A regulatory analysis may include or be separate from an environmental impact assessment of a rule prepared in compliance with the National Environmental Policy Act of 1969.

A "regulatory analysis document" is a written regulatory analysis, whether drafted to comply with Executive Order 12,291, the Regulatory Flexibility Act, or other statutes and executive orders. Regulatory analysis documents also may include similar documents which, though not required by statute or executive order, are prepared to comply with agency regulations or directives stating that the agency intends to treat the documents as regulatory analyses. The term "regulatory analysis document" is intended to include only final analyses prepared in connection with a proposed or a final rule.

A "regulatory analyst" is an agency employee who prepares the whole or part of a regulatory analysis. Regulatory analysts often are economists or policy analysts by training, and they often are assigned to a separate institutional unit within an agency.

The "technical staff" is composed of agency employees within a program office who conduct investigations, prepare technical support documents, and often draft preambles and recommended language for proposed and final agency rules. When a member of the technical staff is assigned to perform a regulatory analysis, he or she then is both a regulatory analyst and a member of the technical staff.

b. Agencies should experiment with a phased system of reducing options. Under a phased system, the agency initially should identify as large a number of options as it can for brief study. As options are considered and rejected, the remaining options should be analyzed with increasing thoroughness. As resource constraints preclude further consideration of an option, the agency should list the option in its regulatory analysis document and explain briefly why the option did not warrant further study.

c. Although the extent to which options are identified and analyzed in regulatory analysis documents is largely a matter for individual agency management, regulatory analysis documents normally should attempt to identify and analyze several realistic regulatory options.

2. Integrating Regulatory Analysis into the Decisionmaking Process

a. Timing of Analytical Input. If regulatory analysis is to be used in a rulemaking, the agency decisionmaking process should be structured to involve agency regulatory analysts early in the evolution of the rule, before alternatives have been eliminated. Regulatory analysis should not be used to produce post hoc rationalizations for decisions already made, nor should it be allowed to unduly delay rulemaking proceedings.

b. Communicating Policy to Regulatory Analysts. Regulatory analysis can be a valuable tool for communicating policy within regulatory agencies because a primary function of regulatory analysis is to measure regulatory options against agency policy goals. Upper level policymakers in agencies should provide clear guidance to subordinate decisionmaking units (such as steering committees and working groups) on the policies that should guide the agency in choosing among options in individual rulemaking proceedings.

c. High Level Involvement at Important Decisionmaking Junctures. Because of the different perspectives of an agency's regulatory analysts and its technical staff, disagreements over appropriate agency policy will often result when both staffs are relied upon in the decisionmaking process. The agency should adopt procedures that will encourage resolution of such disagreements at important decisionmaking junctures at a high policy level.

d. Regulatory Analyst's Role in Responding to Comments. When an agency solicits public comment on a regulatory analysis document or on provisions of a proposed rule that are supported by the regulatory analysis document, the agency should structure its decisionmaking process to ensure that the agency's regulatory analysts participate in developing the agency's response to the public comments.

e. Intragovernmental Comments. Agencies should place in the public file of the rulemaking proceeding any material factual information (as distinct from indications of governmental policy) from other agencies that is directed to the contents of regulatory analysis documents. See ACUS Recommendation 80-6 (1 CFR §305.80-6).

f. Public Availability of Regulatory Analysis Documents. Agencies should make regulatory analysis documents available to the public when they publish proposed and final rules in the *Federal Register*, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. §552(b)(5), might apply to portions of the documents. As appropriate, agencies also should prepare brief summaries of regulatory analysis documents and make them available to the public and appropriate congressional committees. The summaries should contain tables, charts, and other devices, as needed, to make the information contained in the regulatory analysis documents understandable.

3. Use of Regulatory Analysis Where Not Required or Where Options Are Foreclosed

a. Regulatory analysis documents should identify the costs and benefits of reasonable options, even if the agency may lack the statutory authority to implement some of the options. If the agency determines that the best options cannot be implemented under its statutory authority, the agency should so inform the institutions with power to implement them, such as Congress and other agencies.

b. Agencies should consider using regulatory analysis when undertaking significant rulemaking proceedings with projected impacts falling below the established thresholds for requiring formal regulatory analyses.

4. Information in Regulatory Analysis Documents

This part of the Recommendation addresses the information that should be included in regulatory analysis documents for use by the public and agency decisionmakers.[2]

a. When agencies use quantitative models to quantify important variables in regulatory analysis documents, the known limitations of those models should be clearly stated.

b. To prevent quantitative models from oversimplifying complex decisionmaking factors, agencies should require regulatory analysis documents to (1) state clearly the major assumptions that undergird the models relied upon in the regulatory analysis, and (2) describe important decisionmaking variables that are not subject to quantitative analysis.

c. Agencies should require that regulatory analysis documents attempt to characterize the uncertainties that are included in quantitative predictions by using tools such as confidence intervals, multiple assessment models, sensitivity analysis, and worst case analysis.

d. Agencies should require that regulatory analysis documents address explicitly the distributional impacts of rulemaking options and the methods used for discounting future costs and benefits. Agencies should consider using more than one discount rate to clarify the sensitivity of the analytical projections to the discount rate.

e. Agency regulatory analysis documents should make explicit reference to any agency policies that motivate the agency to choose one set of assumptions over another, draw one inference rather than another, or choose one quantitative model over another.

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[2] The Conference has previously recommended that agencies using cost-benefit and similar analyses include in notices of particular proceedings certain information about the analytical methods and assumptions used in conducting the analyses. See ACUS Recommendation 79-4 (1 CFR §305.79-4).

5. Informational Needs for Regulatory Analysis

a. Agency Access to Information. Adequate information on the costs and economic impacts of proposed rules is essential to the regulatory process, and often the most important source of this information is a regulated party. Therefore, in exercising its authority under the Paperwork Reduction Act, the Office of Management and Budget should allow agencies to address reasonable requests for cost and economic impact information to regulated parties when the information is needed for regulatory analysis. The Office of Management and Budget should continue to coordinate its regulatory analysis review function with its paperwork reduction function to ensure that it approves information-gathering activities that are designed to yield information that it is likely to require later in the rulemaking review process.

b. Coordination of Information Gathering Activities. Agencies should coordinate their sponsored research activities with their regulatory analysis initiatives. More specifically, agencies should include regulatory analysts in their process for setting long-term research priorities. In addition, agencies should encourage the participation of representatives from the office responsible for agency-sponsored research in the rulemaking process at the very early stages when informational needs are defined.

c. Cooperative Regulatory Analysis. Agencies should consider whether the techniques suggested for negotiation of proposed regulations in ACUS Recommendation 82-4 (1 CFR §305.82-4) might be useful in undertaking, in specific proceedings, "cooperative regulatory analysis." This would consist of bringing representatives of all affected parties together, consistent with the Federal Advisory Committee Act where applicable, to assess the validity of particular studies prior to relying upon those studies in regulatory analysis documents.

d. Reducing Potential Bias. Agencies should attempt to reduce the impact of bias in the sources of the information that they use in preparing regulatory analysis documents. Though agencies should consider the source of information in giving it weight, this does not mean that they should automatically attach less value to information simply because it comes from a source with an interest in the outcome of the rulemaking. Agencies should reduce the impact of bias by:

(i) consulting, whenever possible, multiple sources of information in preparing regulatory analysis documents;

(ii) carefully citing in regulatory analysis documents all information upon which the analysis draws, and making the information available for public scrutiny at convenient times and places;

(iii) actively soliciting comment and criticism from acknowledged experts in the fields that the documents address.

e. Retrospective Assessments of Previous Analyses. Agencies should regularly perform retrospective assessments of the predictions made previously in regulatory analysis documents. Retrospective analysis can provide information on the accuracy of past agency predictions and thereby enable an agency to increase the accuracy of future predictions or make judgments about the value of regulatory analysis to its regulatory effort.

6. Use of Consultants in Preparing Regulatory Analysis Documents

Agencies can benefit from entering into consulting contracts with qualified experts to aid in gathering and analyzing information for regulatory analysis documents. However, agency personnel should retain the ultimate responsibility for the contents of regulatory analysis documents and guard against consultant conflict of interest. To these ends, agencies should ensure that: (1) agency employees, not consultants, draft regulatory analysis documents, and (2) when a regulatory analysis document relies upon consultant reports, the reports are placed in the public file of the rulemaking proceeding, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. §552(b)(5), might apply to portions of the reports.

7. The Scope and Limits of Regulatory Analysis

a. Cost-benefit analysis is an effective tool for marshalling and analyzing information and for establishing regulatory priorities.

b. Other analytical techniques, such as cost-effectiveness analysis and multi-objective analysis, are also useful for rulemaking that involves health, environmental, historical, artistic, and aesthetic considerations for which markets do not exist.

c. Agency rulemaking decisions must take into account the limits of the agency's statutory authority and its overall policy goals, as well as the limits of the methods and data used in the regulatory analysis.

d. The same criteria should be used in granting exemptions from regulatory analysis requirements, irrespective of whether the proceeding has been commenced to formulate new rules or to amend or repeal existing rules.

RECOMMENDATION 85-3:
COORDINATION OF PUBLIC AND PRIVATE ENFORCEMENT OF ENVIRONMENTAL LAWS

Congress has incorporated into the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and other Federal environmental statutes provisions authorizing private parties to bring enforcement actions in the federal courts. These "citizen suit" provisions generally permit any person or organization to seek injunctions abating activities that violate agency rules, standards, or permits. In addition, the Clean Water Act and the Hazardous and Solid Waste Amendments of 1984 permit plaintiffs to seek civil penalties in private enforcement actions.

As use of private enforcement actions has grown, issues related to coordinating public and private enforcement activities have arisen. Coordination in the development and use of criteria regarding the bringing of cases and maintaining basic consistency in the imposition of penalties is important for several reasons. Notwithstanding the different enforcement perspectives and goals of public and private plaintiffs, inconsistencies in case selection or penalty policy may create actual and perceived unfairness to regulated entities, as similarly situated parties receive varying treatment. Uncertainties about the likelihood or outcome of enforcement actions may increase litigation and decrease voluntary compliance. Lack of coordination may also make it difficult for the Environmental Protection Agency and cooperating state agencies to deploy their limited enforcement resources in the most efficient and effective manner. The recommendation that follows proposes administrative steps which the Environmental Protection Agency can take to provide better guidance to those involved in the enforcement process, and to achieve better coordination between public and private enforcement.

RECOMMENDATION

1. Articulation of Enforcement Policy

In order to achieve better coordination between public and private enforcement efforts, the Environmental Protection Agency should, as feasible, enunciate its views concerning enforcement criteria, calculating penalties, and settling contested cases. When enunciated, the agency's views, or an announcement of their availability, should be published in the Federal Register.[1] Public knowledge of the means by which the EPA calculates penalties will be particularly helpful to courts performing similar calculations in private enforcement actions, and the agency should consider whether more detailed specification of its policies in this respect is feasible. EPA should offer opportunities, consistent with Recommendation 76-5, for public comment on statements of policy regarding calculation of penalties.[2]

2. Improvement of Information Systems

The availability of accurate, complete, and current information about (a) the compliance status of regulated persons and firms, and (b) the outcome of public and private enforcement actions, is essential both for the formulation and implementation of agency enforcement strategies and for the effective use of private enforcement actions. When designing management information systems and reporting requirements, the Environmental Protection Agency should consider improving the quality of such information and its availability for private enforcement, subject to statutory limitations on disclosure of confidential information. The Office of Management and Budget should give similar consideration to the role of compliance information when reviewing EPA data-gathering proposals.

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[1] In administering the Clean Water Act, for example, the EPA has begun this process by issuing a proposed rule to revise program reporting requirements for the assessment of permit noncompliance. See, e.g., 49 Fed. Reg. 29720 (July 23, 1984).

[2] See Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 4 ACUS Recommendations and Reports 62 (1979), 1 CFR §305.76-5. The Administrative Conference recommended that agencies adopting significant interpretive rules or policy statements normally should provide an opportunity for public comment.

3. Notice of Private Actions

When the Environmental Protection Agency receives from a private party notice of an alleged violation, the EPA should request from that party copies of all complaints[3] and other significant pleadings, settlement agreements, and judicial decrees in any action relating to the alleged violation, in which the EPA is not a party.[4]

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[3] The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, §401 (to be codified at 42 U.S.C. §6972 (b)(2)(F)), provide that a plaintiff bringing an action under the citizen suit provision of the Resource Conservation and Recovery Act must serve a copy of the complaint on the Attorney General and the Administrator of the EPA.

[4] Nothing in this recommendation is intended to suggest that a request for or receipt of any such notice or other information or document has or should have any preclusive effect upon the federal government's ability to take enforcement action against the alleged violator.

RECOMMENDATION 85-4: ADMINISTRATIVE REVIEW IN IMMIGRATION PROCEEDINGS

The Immigration and Nationality Act of 1952, as amended, requires the Justice Department to make two major types of decisions affecting aliens—whether to exclude aliens seeking to enter the United States and whether to deport those already in the country. The Act and the accompanying regulations also require a host of collateral decisions concerning visa petitions, waivers of grounds for exclusion or deportation, adjustment of status from non-immigrant to permanent resident, and many other immigration-related matters. Responsibility for making these decisions resides in two very different types of officials. Immigration judges, who are part of the Justice Department's Executive Office for Immigration Review, conduct formal evidentiary hearings in deportation, exclusion, and certain other proceedings. District directors and their subordinates are part of the Immigration and Naturalization Service (I.N.S.). They decide numerous other matters in far less formal proceedings. While the immigration judges have only adjudicative responsibilities, the district directors are principally responsible for the administration and enforcement of the immigration laws within their local geographic districts.

Similarly, there are two channels of administrative appeal for the Justice Department's immigration decisions. The Board of Immigration Appeals (B.I.A.), like the immigration judges, is located within the Executive Office for Immigration Review. The Board reviews almost all immigration judge decisions and some district director decisions. It is composed of five attorney members, all of whom normally participate in every case. It reviews cases *de novo* on the basis of the administrative record and publishes precedential opinions binding on the immigration judges and on the I.N.S.

Twenty-five other categories of district director decisions are appealable to the Associate Commissioner for Examinations, an I.N.S. policymaking official whose appellate jurisdiction has been subdelegated to the Administrative Appeals Unit (A.A.U.). In that unit, cases are decided de novo by individual non-attorney staff members and reviewed by the unit chief. The A.A.U. does not ordinarily publish its decisions.

The Justice Department's current regulations specify with a high degree of clarity which immigration decisions are administratively appealable and to which appellate body. However, reasons for the various assignments are not always evident.

The factors that should influence the choices of forum for administrative review of agency adjudication can be developed through a three-part methodology: (1) identify those attributes of the possible review forums that affect the accuracy, the efficiency, the acceptability, or the consistency of the administrative process; (2) identify the attributes of cases that favor the selection of a review forum with particular forum attributes; (3) determine the extent to which those case attributes tend to be present in the particular class of cases under consideration.

In Recommendation 75-3, the Administrative Conference set forth criteria to guide Congress in selecting the appropriate forum for judicial review of administrative agency action. Using the methodology described above, the present recommendation suggests some additional criteria and describes ways in which that expanded list of factors, with only slight modification, can be employed also to select a forum for administrative review. Applying those criteria, the recommendation then suggests forums for administrative review of various classes of immigration decisions.

RECOMMENDATION

A. Forum For Administrative Review

1. The Justice Department should undertake a comprehensive review of its regulations governing the assignment of forums for administrative review of immigration orders. In examining the categories of Board of Immigration Appeals (B.I.A.) and Administrative Appeals Unit (A.A.U.) jurisdiction, the Justice Department should consider the following factors to the extent applicable:

a. Factors favoring selection of the B.I.A. for a particular class of cases include (i) high likelihood of a substantial impact on the litigants; (ii) the prevalence of issues of law or discretion, particularly when the public impact of a decision will be widespread; (iii) the desirability of providing for judicial review of the class of cases in the courts of appeals.

b. Factors favoring selection of the A.A.U. for a particular class of cases include (i) a high volume of cases; (ii) the prevalence of questions of descriptive fact, rather than issues of law or discretion; (iii) high likelihood that administrative review will require the taking of additional evidence.

c. Once one class of cases is committed to a particular review forum, there is benefit in assigning to that same forum (i) other classes of cases tending to raise similar issues and (ii) other cases which, if sent elsewhere, would frequently result in the bifurcation of proceedings affecting the same individual.

d. With all else equal, the status quo should be preserved.

2. In revising its regulations, the Justice Department should make the following specific case assignments:

a. Appeals from orders of deportation and exclusion should continue to be heard by the B.I.A.

b. Appeals from orders rescinding adjustment of status should continue to be heard by the B.I.A.

3. The Justice Department should also, subject to the development of new information in the review recommended in paragraph 1, make the following case assignments:

a. All appeals from district directors' denials of visa petitions should be heard by the B.I.A.; thus orphan, fiance(e), and occupational petitions should be transferred from the A.A.U. to the B.I.A.

b. If administrative appeals from district directors' denials of waivers of the grounds of exclusion under §212(c) of the Immigration and Nationality Act (applicable to aliens who are returning to a lawful unrelinquished domicile in the United States of seven years) are preserved,[1] they should continue to be heard by the B.I.A.

c. Appeals from district directors' denials of waivers under §§212(h) and 212(i) of the Act (applicable to certain close relatives of American citizens and permanent residents) should be transferred from the A.A.U. to the B.I.A.

d. Appeals from district directors' denials of applications to waive the two-year foreign residence requirement for exchange visitors should be transferred from the A.A.U. to the B.I.A.

e. Appeals from denials of waivers under §212(d)(3) of the Act (applicable to nonimmigrants) should be transferred from the B.I.A. to the A.A.U.

f. Appeals from district director's denials of applications for permission to reapply for admission after exclusion or deportation should continue to be heard by the A.A.U.

B. Structure and Independence of the Board of Immigration Appeals

1. The B.I.A. should adopt a system of randomly selected three-member panels to decide cases. En banc review should be afforded, upon a determination by a majority of the B.I.A., only in the following circumstances: (a) when invoked by any B.I.A. member; (b) at the request of the I.N.S. Commissioner or the Attorney General following decision; or (c) when the aggrieved party petitions for review of a split panel decision.

2. If necessary to accommodate the case transfers recommended in part A above, the B.I.A.'s membership should be slightly increased.

3. Congress should enact legislation to give the B.I.A. statutory recognition. Under the legislation, the B.I.A. should

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[1] A pending Justice Department proposal would eliminate administrative appeals from these orders. The issue of whether these orders should be administratively appealable is beyond the scope of this recommendation.

remain within the Department of Justice. The statute should confer jurisdiction over deportation, exclusion and rescission orders, and should authorize the Attorney General to adjust the Board's jurisdiction as to other matters.

4. The Attorney General should retain the power to review individual B.I.A. decisions. In accordance with current practice, this power should be exercised only in extraordinary circumstances.

RECOMMENDATION 85-5:
PROCEDURES FOR NEGOTIATING PROPOSED REGULATIONS

Negotiations among persons representing diverse interests have proven to be effective in some cases in developing proposals for agency rules. In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 CFR §305.82-4, encouraging the use of negotiated rulemaking by federal agencies in appropriate situations.[1] The concept of negotiated rulemaking arose from dissatisfaction with the rulemaking process, which since the 1960's, in many agencies, had become increasingly adversarial and formalized — unlike the brief, expeditious notice and comment procedure envisioned in section 553 of the Administrative Procedure Act. Experience has now shown that negotiated rulemaking can be a practical technique in appropriate instances.

Since Recommendation 82-4 was adopted, its recommended procedures have been followed four times by federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for pilots. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations. The Occupational Safety and Health Administration encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did lead to substantial agreement resulting in two final rules (which have thus far not been challenged) and one draft rule which, after public comment, is pending before the agency.

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[1] Recommendation 82-4 used the term "regulatory negotiation" to refer to this process. The present recommendation substitutes "negotiated rulemaking" to emphasize that it is addressing negotiation of rules, and not other uses of negotiations in the regulatory process.

The experience of these four cases has shown that the original recommendation was basically sound, and has provided a basis for the Administrative Conference to use in supplementing Recommendation 82-4.

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their character is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real world uncertainties by pursuing a thoughtfully flexible approach. Elements of Recommendation 82-4 and the present recommendation provide a conceptual framework within which to plan and conduct negotiations in a particular proceeding, but should not be taken as a formal model. An agency cannot merely transplant a pattern followed successfully by another agency, or even by itself on another occasion. Nevertheless, agencies that are considering negotiated rulemaking for the first time should find it helpful to discuss their plans with other agencies and persons experienced with the process.

Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views.

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believes that potential long-range savings will more than offset the costs. Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community Relations Service.

RECOMMENDATION

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants — perhaps with the assistance of a mediator or facilitator — to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.

3. The agency should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

4. The agency should consider providing the parties with an opportunity to participate in a training session in negotiation skills just prior to the beginning of the negotiations.

5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

6. In some circumstances, federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators. These agencies should consider making available a small number of staff members with mediation experience to assist in the conduct of negotiated rulemaking proceedings.

7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become

so divided as to suggest modification of the membership of the negotiating group.

8. Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data.

9. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs, either incurred by participants or expended on behalf of the negotiating group. The feasibility of creating such a pool from contributions by private sources and the agency should be considered in the pre-negotiation stages.

STATEMENT OF THE
ADMINISTRATIVE CONFERENCE
OF THE
UNITED STATES

STATEMENT 11:

HEARING PROCEDURES FOR THE RESOLUTION OF SCIENTIFIC ISSUES

The development of effective decisionmaking techniques for the evaluation of scientific studies has been one of the most elusive problems for the administrative process. The implementation of health and safety laws often requires an evaluation of the scientific reliability of laboratory animal, clinical, or epidemiological test data, a determination of risks and benefits based upon those data and other factors, and a final "regulatory conclusion" in which the relevant law is applied in light of the previous conclusions. For example, health and safety agencies commonly are required to determine whether a particular chemical is carcinogenic or otherwise harmful as a prerequisite to reaching a regulatory conclusion.

The quality and legitimacy of these agency decisions can be improved by counseling with eminent scientific experts outside of the agency. Some scientists and others have supported the idea of a "science court" or an institution to which administrative agencies could refer scientific disputes for resolution by expert scientists. In response, agencies have developed several methods of obtaining scientific input, including the use of advisory committees. Science advisory committees are the most common method used to obtain such assistance before an agency reaches a decision. In addition, the Food and Drug Administration (FDA) has created and used twice a unique procedure, the Public Board of Inquiry (PBOI), to obtain independent scientific review of particular regulatory decisions. The PBOI combines the elements of a "scientific hearing" with the more typical "adversarial hearing" approach for the evaluation of scientific evidence.

The PBOI is one of three alternative informal methods of proceeding that FDA offers applicants in lieu of the formal adjudication by an administrative law judge (ALJ) that would otherwise be held to review certain decisions concerning the approval of food additives and new drugs. The other two alternatives are a hearing before an advisory committee or an informal hearing before the Commissioner of FDA. The PBOI consists of a panel of three scientists appointed by the Commissioner. Two of the three scientists are selected from recommendations of the parties. The Board obtains scientific "testimony" within an informal quasi-adjudicative hearing framework, in which the advocacy role of lawyers is minimized in favor of a "scientific forum" approach -- although the Board's decision is an "initial decision" and has the same legal status as an initial decision of an ALJ.

FDA's two PBOI hearings occurred in 1980 and 1983. In the first, a PBOI was convened to determine whether Aspartame, now a widely used artificial sweetener, should be approved as a food additive. In the 1983 proceeding, a PBOI was convened to determine whether Depo Provera, a drug approved in other countries as a contraceptive, should be approved for that use in the United States.

Some analysts contend that FDA's experiences confirm the validity of the "science court" idea for the evaluation of scientific evidence. They argue that techniques like the PBOI are more effective for obtaining scientific advice than traditional adversarial hearings because a PBOI provides the presiding scientists with the flexibility to operate according to procedures that are customary in scientific inquiry. Others suggest that the PBOI costs too much for the value of the opinions obtained from it. A study commissioned by the Conference, however, suggests that the costs or delays of the two PBOI proceedings were significantly enlarged by unanticipated management problems that can be remedied.

The Administrative Conference suggests that continued experimentation with alternative types of hearing procedures for the resolution of scientific issues is justified. Improvements are needed in management of such procedures to make them more efficient and more accurate. Examples include:

(1) appointing the chairperson at the start of the hearing process;

(2) providing additional administrative support for board members;

(3) separating, to the extent possible, the matters of scientific inquiry from any policy issues that may be addressed concerning the ultimate legal or regulatory actions that the agency ought to take;

(4) encouraging boards to utilize an experienced employee as a management adviser in the conduct of the process;

(5) providing an improved opportunity for direct communication between the board and the agency head upon submission of the board's decision;

(6) urging boards to adhere to procedures intended to ensure that the administrative record is complete and usable for successive stages of the administrative and legal process; and

(7) urging persons conducting agency scientific hearings in significant cases to identify the bases for their conclusions.

Other agencies with regulatory programs that depend on scientific determinations should consider experimental use of a process similar to the PBOI as a voluntary alternative to a hearing that would otherwise be held to resolve issues of scientific uncertainty. Examples of other agencies that may have similar needs and objectives include the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration.

BACKGROUND REPORTS
FOR
RECOMMENDATIONS
85-1 THROUGH 85-5

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Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis in Administrative Decision Making

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TABLE OF CONTENTS

- I. INTRODUCTION
  - A. *The Purposes of the Study*
  - B. *The Concept of Cost/Benefit Analysis*
  - C. *The Scope and Methodology of the Study*
- II. ILLUSTRATIVE VARIETIES OF STATUTORY INHIBITIONS TO THE APPLICATION OF PRINCIPLES OF COST/BENEFIT ANALYSIS
  - A. *A Preliminary Note—The Absence of Statutory Barriers in a Significant Number of U.S. Code Titles*
  - B. *Illustrative Varieties*
  - C. *Some Observations on the Illustrative Varieties*
- III. CASE STUDIES OF SOME SPECIFIC STATUTORY BARRIERS—THE NEED FOR RETENTION OR CHANGE
  - A. *Occupational Safety and Health*

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  - B. *Food Safety*
  - C. *Control of Toxic Substances*
  - D. *Mine Closure*
  - E. *Commodity Marketing Quotas*
  - F. *Prevailing Wage Rates in Government Contracts and Grants*
  - G. *Transport of Explosive Materials*
- IV. STATUTORY BARRIERS—THE RELATIONSHIP TO BROADER THEMES IN ADMINISTRATIVE LAW
  - A. *The Delegation Doctrine—Strains in Administrative Law Espousing Revival of the Doctrine and Alternative Means of Achieving its Objectives*
  - B. *Statutory Barriers—Specificity of Congressional Delegation as an Alternative to the Delegation Doctrine*
  - C. *Statutory Barriers and Administrative Discretion*
- V. CONCLUSION

I. INTRODUCTION

A. *The Purposes of the Study*

With increasing intensity and wider application the concept of cost/benefit analysis has been invoked in recent years as a relevant and necessary consideration in governmental decision making. This perhaps has been nowhere more evident than with regard to the activities of federal administrative agencies.

As the demand has increased for assuring that administrative agencies give due weight to the costs as well as the benefits which attend their decisions, advocates of cost/benefit analysis have recognized that there are sometimes obstacles to implementing the concept. On occasion this may have been attributable to agency intransigence. Unswerving devotion to perceived notions of the mission of an agency may be reflected in reluctance to engage in a studious balancing of costs and benefits.

Even when administrative officials concede or even embrace the desirability of cost/benefit analysis, there may be statutory barriers to the application of the principles. The nature of the congressional mandate under which an agency operates may be such that there is no opportunity or discretion for the invocation of principles of cost/benefit analysis without simultaneous conflict with legislative intent.

The purpose of this study was to identify instances under federal law in which statutes constitute barriers to the application of the principles of cost/benefit analysis in administrative decision making, to examine some selected statutory barriers and to assess the need for and desirability of their retention or change. A further purpose was to consider the relationship between such statutory barriers and certain broader themes of administrative law. The ultimate objective was to provide a basis for reflection on the matter of whether or not statutory barriers are useful and desirable.

The stated purposes of the study at first glance seemed rather straightforward, and the study itself generally a matter of research and execution, albeit extensive. This apparent ease and simplicity proved deceptive as a consequence of several factors.

It is commonplace in the folklore of regulatory reform that cost/benefit analysis is synonymous with enlightened decision making. The thought is that better decisions will result if only sufficient effort is made to identify all pertinent costs and benefits of proposed governmental action and then to weigh them, each against the other. A suspicion which appears to underlie some of the ardent advocacy of cost/benefit analysis is that too often the desirability of administrative action has been measured only against perceived notions of public benefit with scant attention given to costs, public and private.

One difficulty this presented for purposes of the study was in discerning what the advocates of cost/benefit analysis really mean when they invoke the principle. Certainly there is no clear evidence of unanimity. At one level it may entail an intricately sophisticated process of factual inquiry and prediction concerning the probable consequences of proposed administrative action and the weighing of those consequences to determine the best course of action. At another level cost/benefit analysis may be little more than a rallying cry for less, or at least delayed administrative action. In this latter sense cost/benefit analysis carries with it the answer to the public policy questions to which it is directed—if only government would think about costs as well as benefits, as it had not in the past, it would regulate less intrusively or not at all.

Notwithstanding the reality that cost/benefit analysis may mean radically different things to different people for different purposes, it was essential for the study that some definition be adopted against which statutes could be measured to determine whether they did or did not present barriers to cost/benefit analysis. The section which follows discusses the definition adopted for purposes of the study. Naturally a determination of the presence of a statutory barrier is a function of the definition employed.

The study was complicated as well by expectations. The expectations were that statutory barriers exist in significant numbers and certainly represent more than occasional and random aberrations. In the face of increasing advocacy of wider and more intense application of principles of cost/benefit analysis in administrative decision making, it seems that the movement encountered not unexpected opposition. And it appears that one manifestation of that opposition was the refrain that Congress often has precluded cost/benefit analysis in the basic statutes governing the actions of particular agencies. Apparently this was heard with sufficient frequency to raise interest in the extent and nature of such barriers.[1] The question was: did they exist on any widespread basis with the consequence of impeding application of principles of cost/benefit analysis? When the study failed to unearth statutory barriers in significant numbers, an inevitable process of reexamination and rethinking was the result. The fact is that what was expected, or at least suspected, was not found.

B. *The Concept of Cost/Benefit Analysis*

The search for a working definition of cost/benefit analysis for purposes of the study was aided by the high levels of interest in recent years at the highest levels of government in bringing about wide application of the principle in governmental decision making. In the process there emerged a general and prevailing definition which provided the benchmark against which statutes were measured to assess their status as statutory barriers.

On February 17, 1981, President Reagan issued Executive Order 12291.[2] Its general purpose was "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations . . . ."[3] Although the focus of the order was upon the rulemaking activities of federal administrative agencies,[4] its provisions concerning cost/benefit analysis in rulemaking provide a general definition of the current meaning of the concept for purposes of all administrative actions and this study.

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[1] Although the study was conducted at the request of and sponsored by the Office of the Chairman of the Administrative Conference of the United States, the views expressed are solely those of the author. Special thanks are due Jeffrey S. Lubbers, Esq., Research Director of the Administrative Conference, for his insights in reviewing drafts of the study and to Scott R. Devenney and Mark L. Dopp, research assistants while students at the University of Missouri-Columbia School of Law.

[2] 3 C.F.R. 127 (1982). The Order is the most recent Presidential effort to require administrative decision making to take into account the broader economic consequences of proposed action. Under Executive Order 11821 President Ford required inflationary impact statements in connection with proposed rules. 3 C.F.R. 926 (1971-1975 Comp.). In Executive Order 12044 President Carter required economic impact analysis in the context of alternative courses of action. 3 C.F.R. 152 (1979). The latter was repealed by Executive Order

Some basic precepts of the order are that:

> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen;
> (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the conditions of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.[5]

These principles are developed further in the order's more explicit requirements for regulatory impact analysis and review for proposed major rules. These provide that in both the preliminary and final stages of rulemaking the following information must be presented:

> (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to benefit;
> (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
> (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms . . . .[6]

Under this approach cost/benefit analysis is an extraordinarily expansive concept. Neither costs nor benefits are confined to quantifiable economics. There is room for taking measure of more sub-

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12291.

[3] Exec. Order No. 12291, 3 C.F.R. 127 (1982).

[4] *Id.* § 1(a)(1) of the order excludes, for example, agency adjudication.

[5] *Id.* at 128.

[6] *Id.* at 129.

jective and intangible costs and benefits. This holds out the prospect of reducing the burdens of applying the concept in, for example, social welfare contexts. This approach also suggests that the application of principles of cost/benefit analysis is to be much more than casual. It is to be a thorough and searching effort to identify all pertinent costs and benefits and to measure them to the extent feasible. The objective is to assure that in selecting among alternative courses of governmental action an agency identifies and adopts that which produces the maximum net benefit to society.

The order does take into account the possibility that an agency may be limited in its ability to engage in and implement cost/benefit analysis. Consequently, its requirements are applicable only "to the extent permitted by law . . . ."[7] Other requirements for regulatory impact analysis and review also recognize the possibility of barriers to cost/benefit analysis. Thus, the order provides for inclusion of:

> (4) A description of the alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
> (5) Unless covered by the description required under paragraph (4) . . ., an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 [the general requirements] of this Order.[8]

There is considerable similarity between the analysis which an agency would employ in complying with these particular requirements and the approach taken in this study. In both instances the common objective is a determination of when, in whole or in part, a statute bars application of principles of cost/benefit analysis of the wide-ranging variety specified under the order.

The principles reflected in Executive Order 12291 are grounded in the common sense of human behavior, history and modern economic theory. First, in its broadest sense, the concept of cost/benefit analysis is common in every day behavior. Weighing whether one will receive as much, or more, in exchange for what one relinquishes is one form of rational behavior which is hardly of recent origin, although anyone who has ever come away from a transaction with the sensation of having obtained the worst of the bargain will readily concede that the ideal of rational behavior is one for which one strives without readily and necessarily achieving it.

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[7] *Id.* at 128.
[8] *Id.* at 129.

Notwithstanding the limitations inherent in this ideal, economics is founded upon a theory of rationality, and at the heart of that rationality is the idea that an individual does not give up a good without an expectation of receiving something of equal or greater value in return, either immediately or in the future. This concept, involving the weighing of costs against benefits with the objective of maximizing benefits, was one of the underpinnings in the development of early economic theory. For example, Jeremy Bentham, in referring to man's desire to avoid pain and achieve pleasure, wrote that these "masters govern us in all we do, in all we say, and all we think."[9] Whether one accepts this philosophy of the classical liberal, the concepts of pain and pleasure, cost and benefit, pervade economic thought.

As to history, some point to the year 1844 and the publication of an essay, "On the Measurement of the Utility of Public Works," by a French engineer, Jules Dupuit, as the beginning of modern cost/benefit analysis.[10] The use of cost/benefit analysis in the public sector in this country, however, appears to be of relatively recent origin, although examples can be found in the last century and at the turn of this century. For instance, the Navigation Improvement Act of 1824[11] and the Reclamation Act of 1902[12] allowed a primitive form of cost/benefit analysis in providing that economic evaluations be drawn from surveys and engineering reports in making decisions.[13] Yet it does not appear that these techniques were employed extensively until as recently as the 1930's when measurement of benefits, and the desire that these benefits should outweigh costs, became more prevalent. The Corps of Engineers began issuing directives to district offices emphasizing the use of cost/benefit analysis in water projects. The 1939 Reclamation Act,[14] for example, required the use of cost/benefit analysis to determine whether irrigation and improvement projects should be authorized.[15] Others have found the first modern application in the

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[9] E. HUNT, PROPERTY AND PROPHETS: THE EVALUATION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES 45 (2d ed. 1975).

[10] P. SASSONE & W. SCHAFFER, COST-BENEFIT ANALYSIS 3-4 (1978). Dupuit suggested a means for assessing the net social benefit of a public works project, a concept which is integral to cost/benefit analysis principles.

[11] Act of May 24, 1824, ch. 139, 4 Stat. 32, 32-33.

[12] Reclamation Act of 1902, ch. 1093, 32 Stat. 388.

[13] R. MCKEAN, EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS 18 (1958).

[14] Reclamation Act of 1939, ch. 418, 53 Stat. 1198.

[15] MCKEAN, *supra* note 13, at 19.

Flood Control Act of 1936[16] which provided that the benefits of projects "to whomsoever they may accrue" must exceed their costs.[17]

Indeed, one must look to even more recent decades for indications of more direct, widespread and intentional applications of the modern concept of cost/benefit analysis in governmental decision making. In the 1960's under then Secretary of Defense McNamara, the idea of cost/benefit analysis in the formulation of defense policy was implemented with enthusiasm and on a widespread scale. This represented an effort to employ systematic analysis measuring costs and benefits in the defense planning process. In 1965, with the inauguration of the Planning-Programing-Budgeting (PPB) System, the fundamental approach was made formal and folded into the Defense Department's basic decision-making process.[18] PPB involved the methodical and complex assessment of program objectives, "output," total costs, and alternatives with the objective of "execut[ing] our choices effectively and efficiently in order to free scarce resources for other good and useful things."[19]

At the other end of the governmental spectrum the use of cost/benefit analysis as a planning tool in social welfare agencies lagged substantially behind the defense and public works areas. This has been explained on the ground that projects in the latter areas lend themselves to more effective advance planning and analysis. Social programs do not fare as well in this respect on account of greater deficiencies in knowledge regarding the relationships between what must go into such programs and what is derived from them.[20]

The historical record affords ample evidence that the studious and intentional application of cost benefit analysis in governmental decision making is neither of recent origin nor a unique invention of Executive Order 12291.

Finally and similarly, Executive Order 12291 is well founded in modern economic theory. The Order addresses the matter of the consequences of administrative action in terms of costs and benefits without limiting these to what can be measured in quantitative terms alone; consequently it is illustrative of what is one formulation of the basic principle of cost/benefit analysis. It must be noted, however, that there are alternative formulations which generally deal with the same fundamental issues. In some degree the distinctions between cost/benefit analysis and these other formulations may be little more than semantic, but in some the distinctions are intended to reflect often subtle shifts in emphasis, and in others the differences may be intended to provide basic substantive limitations on the nature of an agency's inquiry.

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[16] Flood Control Act of 1936, ch. 688, 49 Stat. 1570-96.

[17] SASSONE & SCHAFFER, *supra* note 10, at 4.

[18] R. HAVERMAN, THE ECONOMIC PERFORMANCE OF PUBLIC INVESTMENTS: AN EX POST FACTO EVALUATION OF WATER RESOURCES INVESTMENTS 3 (1972). See generally H. HINRICHS & G. TAYLOR, PROGRAM BUDGETING AND BENEFIT-COST ANALYSIS 212-336 (1969), for a discussion of various cost/benefit techniques employed by a variety of federal agencies in the evaluation of programs during the 1960's.

[19] HAVERMAN, *supra* note 18, at 4-5.

[20] *Id.* at 1-3, 23-32.

This phenomenon of gradation and variation in concepts is an apparently intractable part of the cost/benefit analysis landscape. As one observer has noted:

> One of the more confusing aspects of incorporating cost analysis into evaluation and decision making is that a number of different, but related, concepts and terms are often used interchangeably in referring to such approaches. Among these are cost-effectiveness, cost-benefit, cost-utility, and cost-feasibility. Although each is related to and can be considered to be a member in good standing of the cost-analysis family, each is characterized by important differences that make it appropriate to specific applications . . . .[21]

A sampling of some of the variations on the theme illustrates that there really is no necessarily common and accepted definition of the concept, at least as reflected in common usage.

Typically cost/benefit analysis represents the technique for "evaluation of alternatives according to a comparison of both . . . costs and benefits when each is measured in monetary terms."[22] This analytical approach might be employed to measure the availability of a single alternative in light of a requirement that it can be adopted only if there is a net benefit-to-cost, or it might be employed to select from among competing alternatives with the object of singling out that with the highest benefit to cost ratio.[23]

Cost-effectiveness analysis, in contrast, "refers to the evaluation of alternatives according to both their costs and their effects with regard to producing some outcome or set of outcomes."[24] This method does not require that benefits be reduced to monetary terms. Under it one assesses the relative cost of achieving a common objective by various means for the purpose of selecting that which provides "the maximum effectiveness per level of cost or which require[s] the least cost per level of effectiveness."[25]

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[21] H. LEVIN, COST-EFFECTIVENESS: A PRIMER 17 (1983).

[22] *Id.* at 21.

[23] *See generally* COST-BENEFIT ANALYSIS 9-65 (B. McCormick ed. 1972).

[24] LEVIN, *supra* note 21, at 21.

And another, cost-utility analysis, affords yet another method which is even further removed from the necessity for quantitative information. Under it costs are measured against "the estimated value or utility of their outcomes."[26] Cost-feasibility analysis introduces another dimension in which one examines alternatives only in terms of their costs to ascertain whether they are possible in light of available budgetary resources.[27]

These various approaches have much in common, in objective and approach, with the principal differences in the method and level of specificity of measuring benefit, effectiveness and utility. The shared desire is the selection of the alternative with "the lowest cost for any particular result or the best result for any particular cost."[28] Yet it is apparent that the economists employ much more precise and refined categorizations than those in the non-professional and governmental arenas. Indeed, there are even subtler gradations. For example, Lester B. Lave has prepared an analysis of the various frameworks for regulation which provides, in varying degree, an opportunity for the weighing of benefits against risks.[29] Consequently, a statute might provide for comparison of direct risks against direct risks with the focus upon adverse and beneficial effects: for example, of a particular food upon health. In this context one risk might be mitigated while another is created; the respective risks would be weighed. An expansion upon this concept might allow inclusion of indirect risks in the analysis.[30] In this context not only persons consuming a food in question would be taken into account, but also those producing and distributing the food. Nevertheless, in either case one would not be entitled to take into account effects unrelated to the health of affected persons. In another formulation, risk-benefit, Lave notes that one would be entitled to take into account general benefits as well as general risks of nonhealth as well as health consequences.[31]

It is apparent that Executive Order 12291 draws extensively on this economic literature. It is equally apparent that it does not fall neatly within the traditional quantitative approach to cost/benefit analysis. In allowing identification of those costs and benefits which do not reduce to monetary terms, it allows a higher degree of subjectivity in weighing alternatives. It is unlikely the economists would view the approach in Executive Order 12291 as true cost/benefit analysis. Nonetheless, the Executive Order was selected for purposes of the study in light of its recent origins, widespread recognition in governmental circles and ties to the common sense, historic and economic underpinnings of cost/benefit analysis. It seemed to present as good a working definition as any available for identifying statutes which preclude cost/benefit analysis.

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[25] *Id.* at 18.

[26] *Id.* at 26.

[27] *Id.* at 30.

[28] *Id.* *See also* COST-EFFECTIVENESS ANALYSIS (T. Goldman ed. 1967); E. MISHAN, COST-BENEFIT ANALYSIS (3d ed. 1976); E. MISHAN, ECONOMIC EFFICIENCY AND SOCIAL WELFARE (1981).

[29] *See generally* L. LAVE, QUANTITATIVE RISK ASSESSMENT IN REGULATION 8-28 (1982).

[30] *Id.* at 15-18.

[31] *Id.* at 17-19.

C. *The Scope and Methodology of the Study*

With only a few exceptions, the study was rather comprehensive. The objective was to identify statutory barriers to cost/benefit analysis wherever they might be found in federal law. Consequently, the definitions of agency and administrative decision making applied in the search for statutory barriers also were comprehensive.

For purposes of the study the definition of administrative agency was not confined to traditional conceptions of agencies primarily regulatory in nature. Had that approach been adopted, the focus might have been limited to agencies whose activities concern the imposition of "government standards and significant economic responsibilities on individuals or organizations outside the federal establishment."[32] Rather the study looked to broader definitions such as those provided in the Administrative Procedure Act[33] (APA) and Executive Order 12291. The former provides that "agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .;"[34] the latter provides that " 'agency' means any authority of the United States that is an 'agency' under 44 U.S.C. § 3502(1) . . . ."[35] The effect was to include most arms of the federal establishment which would customarily be recognized as and considered government agencies.

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[32] Domestic Council Reform Group on Regulatory Reform, The Challenge of Regulatory Reform-A Report to the President 47 (Jan. 1977).

[33] 5 U.S.C. §§ 551-76 (1982).

[34] 5 U.S.C. § 551(1) (1982).

[35] Exec. Order No. 12291, 3 C.F.R. 127, 128, § 1(d) (1982). Section 3502(1) of Title 44 defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency . . . ." 44 U.S.C. § 3502(1) (1982).

However, the exceptions to these definitions were taken into account. Thus, Congress, the judiciary, territorial governments and other governmental entities and activities excluded under the APA definition were not considered.[36] Generally, agencies excluded from the reach of Executive Order 12291 were treated similarly.[37]

One important consequence of this approach was the inclusion of governmental activities pertaining to eligibility for federal grants, assistance and contracts. Matters of this nature might be considered by some officials as suitable candidates for application of principles of cost/benefit analysis, and statutory barriers might inhibit their ability to do so.

Furthermore, no effort was made to limit the kinds of agency decision making for purposes of the study. Thus, "minor" as well as "major" rulemaking authority was considered relevant.[38] Actually, any form of agency action was considered within its scope,[39] and as a result statutory barriers were sought in all facets of administrative decisional authority, including the traditional categories of formal and informal rulemaking, formal and informal adjudication, and all other forms of a less traditionally determinate nature.

In light of the objective of determining the existence and nature of statutory barriers to the application of principles of cost/benefit analysis by federal agencies, the initial step in the study was to examine most titles of the United States Code in their entirety. Some titles, however, were not examined on the basis of a determination of improbable relevance. Thus, Titles 18 (Crimes and Criminal Procedure), 26 (Internal Revenue Code), 28 (Judiciary and Judicial Procedure), and 48 (Territories and Insular Possessions) were excluded at the outset. Following review of the code the potential statutory barriers identified were categorized to the extent possible. These results and findings are presented in Part II. Several selected statutes were analyzed in greater detail and are presented in the case studies in Part III.[40]

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[36] See 5 U.S.C. § 551(1) (1982), which excludes various governmental activities from the definition of agency, including "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; [and] (D) the government of the District of Columbia." *Id.*

[37] See 4 U.S.C. § 3502(1) (1982), which excludes from the definition of agency "the Federal Election Commission, the government of the District of Columbia and of the territories and possessions of the United States and their various subdivisions, or government owned contractor operated facilities including laboratories engaged in national defense research and production activities . . . ." *Id.*

[38] Executive Order 12291 draws a distinction between major and minor rules. The former, for example, are those with probable annual effect on the economy of $100 million or more.

[39] See 5 U.S.C. § 551(13) (1982), which defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." *Id.*

In assessing the existence and nature of a statutory barrier the working definition provided by Executive Order 12291 was measured against the statutes examined. The question asked in each instance was whether the terms of the statute would preclude carrying out the directives of the Order. It was taken into account that a statutory barrier to application of the principles of cost/benefit analysis need not be total. A barrier might be partial in that, for example, it precludes consideration of nonhealth benefits. The attempt was made in this study to identify barriers of this nature as well; any inhibition of an agency's ability to employ the wide-ranging balancing of pluses and minuses of Executive Order 12291 would, in some measure, constitute a statutory barrier. The effect was that, for purposes of this study, the concept of cost/benefit analysis was treated expansively.

This approach was consistent with the economists' perceptions of legal constraints on the application of cost/benefit analysis principles. For example, Sassone and Schaffer have identified a variety of constraints in cost/benefit analysis, including budgetary, social, political, institutional and legal. As to the latter they use the example of pollution which would result from a project which cannot be considered in terms of costs and benefits because some legal standard places a standard or limit on the permissible amount of pollution.[41] This constrains the analysis because some alternatives which the analyst might otherwise consider are precluded by the legal constraint and leave the analyst to address only those which are within the legal limits.[42]

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[40] One caveat concerning the methodology is in order. The methodology employed required the reviewers of the Code to go beyond the immediate areas of personal expertise. This was to be expected because of the comprehensive nature of the study, and the phenomenon was even more pronounced because the principal reviewers were second and third year law students. Consequently, there may be statutory provisions which deserve to be included as examples of statutory barriers which are not. This is not meant as a criticism; rather it is to explain why readers might wonder why particular statutes which they consider barriers to cost/benefit analysis have not been included in the study. Although it may be that a statute was considered and consciously excluded, it may also be that an inexperienced reviewer, unfamiliar with the applicable substantive law, passed over it. There was really no way of avoiding this, absent a team of experienced experts reviewing statutes within their respective areas of competence. This was beyond the reach of the methods employed in this study.

[41] SASSONE & SCHAFFER, *supra* note 10, at 160.

II. Illustrative Varieties of Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis

The following section of this article presents the results of the basic survey of the United States Code, with the exception of certain titles as noted above.

A. *A Preliminary Note—The Absence of Statutory Barriers in a Significant Number of U.S. Code Titles*

Any expectation of widespread existence of statutory barriers to the application of principles of cost/benefit analysis is diminished to a degree by the fact that numerous titles of the United States Code revealed no such barriers. None was identified in Titles 1 (General Provisions), 2 (The Congress), 3 (The President), 4 (Flag and Seal, Seat of Government and the States), 5 (Government Organization and Employees), 6 (Official and Penal Bonds), 9 (Arbitration), 11 (Bankruptcy), 13 (Census), 14 (Coast Guard), 17 (Copyrights), 20 (Education), 24 (Hospitals, Asylums and Cemeteries), 27 (Intoxicating Liquors), 32 (National Guard), 35 (Patents), 37 (Pay and Allowances of the Uniformed Services), 41 (Public Contracts), and 44 (Public Printing and Documents).

The absence of statutory barriers in this number of titles of the Code has independent significance; the scope of the statutory barrier "problem" does not appear to be quite as extensive as some might have expected.

B. *Illustrative Varieties*

Most statutory barriers to the application of principles of cost/benefit analysis were found in areas in which the government regulates or controls the conduct of private business enterprise. This was not unexpected in light of the pervasiveness of government regulation of business, notwithstanding recent initiatives toward deregulation. They arise in various forms and are ostensibly justified on the basis of varying rationales ranging from economic regulation to protection of the public health, safety and welfare. What these statutory barriers represent are instances where Congress has made rather precise judgments concerning the controls to be imposed and limited the discretion of federal agencies to relax or alter them. The effect is to preclude the application of principles of cost/benefit analysis. It is clear that the economist would view such limitations as legal constraints on the ability of the analyst to employ cost/benefit analysis within the zone of preclusion. In contrast, the lawyer is likely to consider this simply a customary and even necessary constraint on administrative discretion, inherent in any statute which delegates decision-making power to an agency with any measure of specificity. As will be seen, this divergence presents special problems in determining what should be considered a true statutory barrier to cost/benefit analysis.

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[42] *Id.*

Many of these barriers take the form of mandatory statutory standards. Thus, under the Cotton Standards Act[43] most transactions in cotton must be in the terms of the official cotton standards' names and descriptions used in the Act. Generally, it is unlawful for either private parties or the Secretary of Agriculture to evade the statutory standards for cotton.[44] Similarly, there are statutory standards for gauges for sheet and plate iron steel,[45] electrical and photometric measurement,[46] barrels for apples[47] and barrels for limes.[48] Standards of this variety are intended primarily to achieve objectives of uniformity. In this sense they represent congressional rejection of flexibility, but to the extent that agencies are deprived of opportunities for cost/benefit analysis in such matters, the congressional determination is not likely to prove controversial.

Other mandatory statutory standards involve more fundamental policy choices, including matters of public health and safety. For example, there are standards for occupant restraint systems in automobiles,[49] regrooved tires,[50] and fuel economy in passenger cars,[51] which constrict administrative discretion to engage in cost/benefit analysis. Others include mandatory performance standards under the Surface Mining Control and Reclamation Act,[52] mandatory requirements for adaptive equipment for automobiles for disabled veterans,[53] standards for safety equipment on railroad engines and cars,[54] standards for goods of its own manufacture which a railroad may transport,[55] and standards for transport of hazardous materials on passenger aircraft.[56]

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[43] 7 U.S.C. §§ 51-65 (1982).

[44] *Id.* § 52.

[45] 15 U.S.C. § 206 (1982).

[46] *Id.* § 223.

[47] *Id.* § 231.

[48] *Id.* § 237.

[49] *Id.* §§ 1410, 1412. See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983), in which the Supreme Court found that the Secretary of Transportation acted arbitrarily and capriciously in rescinding a standard concerning passive restraints in automobiles.

[50] 15 U.S.C. § 1424 (1982).

[51] *Id.* § 2002.

[52] 30 U.S.C. § 1265 (1982).

Mandatory statutory standards concerning employee health and safety under the Occupational Safety and Health Act[57] and carriage of explosives on vessels have been selected for more extensive analysis in this study. They are considered in Part III below.[58]

Statutory prescriptions which restrict the application of principles of cost/benefit analysis often apply to product composition and labeling. Thus, there are instances where Congress has provided for mandatory nutritional enrichment of certain grain flours within the jurisdiction of the Department of Agriculture,[59] and mandatory fuel economy labels for automobiles.[60] Various provisions of the Federal Food, Drug, and Cosmetic Act prescribe mandatory product labeling, including matters such as saccharin labeling,[61] margarine labeling,[62] drug labeling,[63] and flavor, color, and preservative labeling.[64] As a general matter the Commissioner of Food and Drugs has no authority to alleviate these requirements.

Perhaps the most celebrated example of a statutory barrier to the application of principles of cost/benefit analysis is the Delaney Clause in the food and drug law which precludes the use of food additives which induce cancer in humans or animals.[65] This barrier is discussed in detail in Part III.[66]

A variety of limitations on cost/benefit analysis have been included in statutory provisions providing for mandatory requirements for registration, permits and licenses. These take the form of either requirements before certain activities may lawfully be conducted or conditions on activities, once registered or licensed. There are several examples in statutes pertaining to the Department of Agriculture, including provisions for pesticide registration,[67] permits for importation of nursery stock,[68] licensing of commission merchants, dealers, and brokers,[69] certification of shipments of apples and pears,[70] and certification of grapes and plums for export.[71] Under the Food, Drug, and Cosmetic Act there are statutory requirements for certification of drugs containing insulin,[72] establishment registration,[73] and prescription requirements for dispensation of controlled substances.[74] These are illustrative of the variety of statutory barriers of this nature. Indeed, more were identified in this area than perhaps in any other,[75] although this should not be taken as a special indicator of congressional behavior. It may simply reflect the widespread application of registration, permits and licenses as techniques of regulatory control.

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[53] 38 U.S.C. ch. 39 (1982).

[54] 45 U.S.C. § 1 (1982).

[55] 49 U.S.C. § 10746 (1982).

[56] *Id.* § 1807(a).

[57] *See, e.g.*, 29 U.S.C. §§ 651, 655 (1982).

[58] *See generally infra* Parts III.A & G.

[59] 7 U.S.C. § 1431c (1982).

[60] 15 U.S.C. § 2006 (1982).

[61] 21 U.S.C. §§ 343(o)-(p) (1982).

[62] *Id.* § 347(b)-(c).

[63] *Id.* § 352.

[64] *Id.* § 343(k).

[65] *Id.* § 409. *See also* new animal drug provisions in *id.* § 360(d).

[66] *See infra* part III.B.

Another manifestation of the statutory barrier is found in the area of governmental inspections. Thus, mines must be closed if certain specified dangers are discovered in the course of inspection,[76] the Coast Guard must inspect the crew's quarters on American vessels with the prescribed frequency,[77] and distilled spirits must first be placed in a public store or bonded warehouse and cannot be removed until inspected and stamped.[78] In these instances the breadth of discretion typical of regulatory inspections is absent.

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[67] 7 U.S.C. §§ 136(a), (d), (e) (1982).

[68] *Id.* § 154.

[69] *Id.* §§ 499(c), (d).

[70] *Id.* § 581.

[71] *Id.* §§ 591, 594.

[72] 21 U.S.C. § 356(b) (1982).

[73] *Id.* § 360(b).

[74] *Id.* § 829.

[75] *See, e.g.*, 29 U.S.C. § 1242 (1982) (enrollment of actuaries under ERISA); 29 U.S.C. § 187 (1982) (certain conditions in leases and prospecting permits); 30 U.S.C. § 201(b) (1982) (prospecting permits or exploratory permits for coal deposits); 30 U.S.C. § 241(a) (1982) (prospecting permits for oil shale leases); 30 U.S.C. § 261 (1982) (prospecting permits for sodium deposits); 30 U.S.C. § 1266(b) (1982) (lead and zinc stabilization program); 33 U.S.C. § 1311 (1982) (EPA effluent limitations); 33 U.S.C. § 1326 (1982) (EPA thermal discharge permits); 47 U.S.C. § 222 (1982) (limitations on certain mergers of domestic and international telegraph carriers); 47 U.S.C. § 310 (1982) (limitations on grants of FCC licenses); 47 U.S.C. § 734(d) (1982) (limitations on foreign ownership of communication satellites); 49 U.S.C. § 5(f) (1982) (protection of employees in ICC approval of railroad mergers); 49 U.S.C. § 10705(a)(3) (1982) (limitation on ICC establishment of joint rates of certain street electric railways).

[76] 30 U.S.C. § 727 (1982).

[77] 46 U.S.C. § 660 (1982).

[78] 19 U.S.C. § 467 (1982).

The statutory barrier is also present in the area of mandatory paperwork, the reports and records required by statute rather than administrative order. Thus, there is no administrative choice or discretion in the records to be kept by poultry packers,[79] warehouses storing agricultural products,[80] certain labor organizations and their officers and employees,[81] and persons subject to OSHA[82] and ERISA.[83] These are illustrative.[84] Statutorily mandated reports and records are a common phenomenon.

A number of statutory barriers exist in the area of governmental control of agriculture. These affect both the production and marketing of agricultural products. They take such forms as acreage allotments,[85] price supports[86] and commodity marketing quotas.[87]

The other principle area in which a significant number of statutory barriers were identified is in the dispensation of governmental benefits. This includes not only traditional benefits, but also grants, contracts and loans.

In connection with social welfare benefits one finds a mandatory definition of household income for purposes of determining eligibility for food stamps.[88] Similarly, there are mandatory allocations and limitations in the determination of various Veterans Administration benefits.[89]

A common mechanism for administrative control is the attachment of terms and conditions to government contracts which do not necessarily relate to the direct objects of the contract. In numerous instances it is Congress and not the agencies which has made the determination of what those terms and conditions are to be. The effect is a statutory barrier to agency assessment of whether the benefit of such terms and conditions is outweighed by their cost. Thus, there are statutory time limitations on USDA contracts for supplying and mailing seed packets,[90] limitations on military contracts for property and services,[91] limitations on conflicts of interest in certain research contracts,[92] preferences for concessionaires under prior contracts with the Secretary of the Interior,[93] mandatory elements for certain historic preservation grants,[94] various mandatory provisions in highway construction contracts,[95] limits on the amount the Veterans Administration may pay for care in a state home,[96] and time limitations on the length of public utility contracts[97] and the completion of railroads on public lands.[98]

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[79] 7 U.S.C. § 221 (1982).

[80] *Id.* § 260.

[81] 29 U.S.C. §§ 431-33, 438, 461 (1982).

[82] *Id.* § 657.

[83] *Id.* §§ 1023-24, 1030.

[84] *See also* 30 U.S.C. § 732 (1982) (Metal and Nonmetallic Mine Safety Act); *id.* § 813 (Coal Mine Health and Safety Act); 31 U.S.C. § 1101 (1982) (reports and records of currency and foreign monetary transactions); 47 U.S.C. § 1434 (1982) (certain firms subject to FCC jurisdiction); 50 U.S.C. § 126 (1982) (licensees for disposition of explosives or ingredients for explosives).

[85] 7 U.S.C. §§ 1374, 1379(c) (1982) (mandatory acreage allotments for wheat and mandatory monitoring).

[86] *Id.* §§ 1421-22, 1441 (mandatory price support floors).

[87] Marketing quotas under the jurisdiction of the Secretary of Agriculture for cigar-filler tobacco, 7 U.S.C. § 515(h) (1982); sugar, *id.* §§ 1111-18, 1134 (1982); tobacco, *id.* §§ 1312-13 (1982); corn, *id.* § 1329 (1982); wheat, *id.* §§ 1330, 1334, 1340 (1982); cotton, *id.* §§ 1342, 1347 (1982); rice, *id.* §§ 1352, 1355 (1982).

[88] 7 U.S.C. § 2014 (1982).

[89] 38 U.S.C. §§ 102, 103, 105, 110, 246, 302, 404, 360, 505, 705, 708, 743, 712, 1504, 1511, 1621, 1631, 1661, 1673, 1682, 1685, 1690-93, 1700-14, 1762 (1982).

Many of these limitations pertain to wages and working conditions for employees of those who contract with the government. In this vein there are prevailing wage rate and hiring preferences in certain contracts and grants relating to Indians,[99] prevailing wage rate requirements in pollution prevention grants,[100] in the conversion of leased postal facilities,[101] and in various Housing and Urban Development contracts.[102] Hours of labor on public works are also limited,[103] and the use of convict labor is prohibited in connection with Postal Service equipment and supplies.[104]

A variety of statutory limitations also restrict agency discretion in the area of government loans. There are limitations on persons eligible for Department of Agriculture real estate loans, on their purposes and terms,[105] and on persons eligible for operating loans[106] as well as emergency loans.[107] Similarly, loans under the Export-Import Act,[108] to countries found to violate human rights,[109] for education[110] and homes by the Veterans Administration,[111] and for urban renewal[112] are subject to statutory limitations on agency discretion.

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[90] 7 U.S.C. § 416 (1982).

[91] 10 U.S.C. §§ 2304, 2306 (1982).

[92] 15 U.S.C. § 789 (1982).

[93] 16 U.S.C. § 20(d) (1982).

[94] *Id.* § 560.

[95] 23 U.S.C. §§ 113, 114, 127, 131, 136, 154 (1982).

[96] 38 U.S.C. § 1820(b) (1982).

[97] 40 U.S.C. §§ 327-32 (1982).

[98] 43 U.S.C. §§ 942-45 (1982).

[99] 25 U.S.C. §§ 450(e), 1612(b)(1) (1982).

[100] 33 U.S.C. § 1372 (1982).

[101] 39 U.S.C. § 410(d) (1982).

[102] 42 U.S.C. § 3310 (1982).

[103] 40 U.S.C. §§ 327-32 (1982).

[104] 39 U.S.C. § 2201 (1982).

[105] 7 U.S.C. §§ 1922-25 (1982).

Many of the statutory barriers just discussed have obvious impact on individual persons, but there are some of an even more direct and personal nature. There are those which affect government employees within the armed services in the form of mandatory retirement ages for certain members of the military.[113] Outside the military one statute precludes appointment to certain Veterans Administration medical positions unless the person is proficient in English.[114] In the case of immigration controls there are statutory limitations on the number of immigrant visas which may be issued.[115]

The survey also revealed a number of statutory barriers which do not lend to broad categorization or generalization. One finds, for example, various limitations on the powers of the Department of Agriculture, including provisions for mandatory retention of officially inspected grain samples,[116] and limitations on the use of cooperative extension funds.[117] There are limits on the outstanding bonds and notes of the Commodity Credit Corporation,[118] on when professional football games may be televised,[119] on the number of governing bodies the United States Olympic Committee is allowed to recognize per sport,[120] and on postal rates for certain articles which may not vary with distance.[121] Others are mandatory discriminating duties on goods imported in non-United States ships,[122] mandatory presumptions under the Black Lung Benefits

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[106] *Id.* §§ 1941-43.

[107] *Id.* § 1961.

[108] 12 U.S.C. § 635 (1982).

[109] 22 U.S.C. § 262(f) (1982).

[110] 38 U.S.C. §§ 1686, 1998 (1982).

[111] *Id.* § 1801; 42 U.S.C. § 1477 (1982).

[112] *Id.* §§ 1451, 1455, 1459 (1982).

[113] 10 U.S.C. §§ 1164, 3883, 3885-86 (1982).

[114] 38 U.S.C. § 4105(c) (1982).

[115] 8 U.S.C. §§ 1151-52, 1159 (1982).

[116] 7 U.S.C. § 87(a) (1982).

[117] *Id.* § 345.

[118] 15 U.S.C. § 713(a) (1982).

[119] *Id.* § 1293.

[120] 36 U.S.C. § 391 (1982).

[121] 39 U.S.C. § 3683 (1982).

[122] 19 U.S.C. § 128 (1982).

Act,[123] and limitations on the power of the Secretary of Transportation to approve certain projects.[124]

C. *Some Observations on the Illustrative Varieties*

In addition to the relative rarity of statutory barriers to cost/benefit analysis,[125] a candid appraisal of these statutes also indicates that as a group they are generally obscure. This is not to suggest that on an individual basis they are unimportant. Yet in the grand sweep of what Congress and its delegatees, the agencies, are about, the statutory barrier has only a limited and minor role.

Nevertheless, it does appear that on those occasions when Congress does elect to create a statutory barrier to cost/benefit analysis, rather than to delegate that authority to an administrative agency, it is most likely to do so in the context of governmental control of business activities. Beyond that, it is difficult to discern any common threads.

The illustrative varieties as a whole also demonstrate the divergence between cost/benefit analysis as perceived by the economist and the lawyer. The economist is likely to view these limitations on discretion as constraints and thus barriers. The lawyer, in contrast, is likely to view many of them as cases of specificity in congressional action, often in areas which one would not consider appropriate candidates for cost/benefit analysis. Yet the economist's view of the role and potential of this method of decision making is much more expansive, and he is likely to view the specificity of the statute as a constraint which reflects a prior, perhaps crude and perhaps unintended weighing of costs and benefits in the design of the statute itself. What the statute does is confine the alternatives which true and full cost/benefit analysis would consider.

III. CASE STUDIES OF SOME SPECIFIC STATUTORY BARRIERS—THE NEED FOR RETENTION OR CHANGE

The following portion of this article examines a few of the illustrative varieties in detail. The seven were selected with an eye to their importance in some instances and in others their representation of different types of statutory barriers designed to achieve different objectives. Most, it will be noted, are drawn from the area of governmental control of business activities. The seven concern occupational safety and health, food safety, control of toxic substances, mine closure, commodity marketing quotas, prevailing wage rates in government contracts and grants and transport of explosive materials.

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[123] 30 U.S.C. § 921(b) (1982).

[124] 49 U.S.C. § 1653(f) (1982).

[125] *See supra* part II.A.

The purpose of these case studies is to consider the meaning and impact of each statutory barrier in the context of the desirability of retention or change. If they in fact serve useful purposes without unintended or unduly burdensome consequences, there is no need for change. On the other hand, if the conclusion is to the contrary, perhaps the barrier merits relaxation or abandonment. The thought is that the case studies may give some indication of whether statutory barriers to cost/benefit analysis are generally useful and desirable, and may, in addition, provide insight concerning what constitutes a true statutory barrier.

A. *Occupational Safety and Health*

The Occupational Safety and Health Act of 1970 placed significant administrative responsibilities on the Secretary of Labor to pursue the objective of a safe workplace with an attendant reduction in injury and illness on the job. One of the means employed by Congress in pursuit of this objective was the delegation to the Secretary of the authority "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . . ."[126]

Section 655(b) of the Act provides the Secretary discretionary authority to adopt such standards by rule when he "determines that a rule should be promulgated in order to serve the objectives"[127] of the Act. The Secretary's task in developing certain occupational and health standards is complicated, however, by the provision that:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the

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[126] 29 U.S.C. § 651(b)(3) (1982).

[127] *Id.* § 655(b)(1).

> latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.[128]

This special attention given toxic materials and harmful physical agents in the workplace was motivated in part by recognition of their increasing use in the workplace. It was estimated that every twenty minutes a new and potentially toxic chemical was introduced.[129]

As a statutory barrier to cost/benefit analysis this section is an anomaly. As indicated in the Senate Report,

> [t]he committee intends that standards promulgated under section 6(b) shall represent feasible requirements, which, where appropriate, shall be based on research, experiments, demonstrations, past experience and the latest available scientific data. Such standards should be directed at assuring, so far as possible, that no employee will suffer impaired health or functional capacity, or diminished life expectancy, by reason of exposure to hazards involved, even though such exposure may be over the period of his entire working life.[130]

This suggests the possibility that the highest priority must be given matters of worker safety. On the other hand, there is language in the statute as well as the Senate Report suggesting that feasibility provides a countervailing consideration which opens opportunities for cost/benefit analysis.

The United States Supreme Court has considered the meaning of this statute in recent years. Its decisions provide guidance on the issue of what is required to create an effective statutory barrier.

Industrial Union Department v. American Petroleum Institute[131] concerned the Occupational Safety and Health Administration's (OSHA) standard limiting occupational exposure to the carcinogen benzene. The issue was whether a showing that the substance causes cancer at high exposure levels "is a sufficient basis for a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible."[132] The agency position was that the statute required this result and that it was under no obligation to engage in cost/benefit analysis.[133] The Court of Appeals for the Fifth Circuit disagreed. It concluded that the benefits of the regulation had to bear a reasonable relationship to its costs and that OSHA had failed to demonstrate this.[134]

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[128] *Id.* § 655(b)(5).

[129] S. Rep. No. 91-1282, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5778.

[130] *Id.* at 5183-84.

[131] 448 U.S. 607 (1980).

[132] *Id.* at 611.

The judgment was affirmed in the Supreme Court. A plurality did not directly resolve the cost/benefit analysis issue. It found that there is a threshold determination which must be and had not been made. What the Secretary must do first is determine whether issuance of a standard is necessary and appropriate to deal with the health question at issue. Only then would it be necessary to determine whether the statute

> requires him to select the most protective standard he can consistent with economic and technological feasibility, or whether, as respondents argue, the benefits of the regulation must be commensurate with the costs of its implementation. Because the Secretary did not make the required threshold finding in this case, we have no occasion to determine whether costs must be weighed against benefits in an appropriate case.[135]

The plurality did, however, give some indication of its inclination to conclude that the respondents' position was consistent with congressional intent.[136] And Justice Powell, concurring in part, was willing to answer the question which the plurality reserved, rejecting OSHA's claim that once the threshold determination was made, cost/benefit analysis need not be employed.[137]

Justices Blackmun, Brennan and White joined Justice Marshall in dissent. They found the language of the statute and the intent of Congress clear and noted that "no cost-benefit analysis is referred to at any point in the statute or its legislative history."[138] The feasibility standard was only "to prevent the Secretary from materially harming the financial condition of regulated industries in order to eliminate risks of impairment,"[139] although they also felt it was not necessary to decide this definitively.[140]

The Benzene case, thus, left open the basic issues concerning the role, if any, for cost/benefit analysis under section 655(b). The Cotton Dust case[141] in 1981 resolved the matter.

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[133] American Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (5th Cir. 1978).

[134] *Id.* at 502-05.

[135] Industrial Union Dep't v. American Petroleum Inst., 448 U.S. at 640.

[136] *Id.* at 642.

[137] *Id.* at 668-69. See *infra* Part IV.B for a discussion of the concurring opinion of Justice Rehnquist on grounds of impermissible delegation of legislative power.

[138] *Id.* at 719.

[139] *Id.* at 720.

[140] *Id.* at 720-21.

The Court focused on the "to the extent feasible" language in the statute and concluded that "cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."[142] Feasibility analysis requires an assessment and conclusion that the standard is "capable of being done."[143] Under this interpretation the statute did constitute a barrier to cost/benefit analysis, but by virtue of a statutory requirement for a different and lesser kind of analysis.

These two cases are instructive on the subject of statutory barriers in a number of important respects. At the most fundamental level they demonstrate that if Congress desires to create a statutory barrier to application of principles of cost/benefit analysis, it must do so with considerable specificity and above all, clarity. To the extent that ambiguity in the statutory language and even the legislative history can be reduced or eliminated, the likelihood of effectuating the will of Congress will increase.

The alternative is substantial risk of what occurred in the Benzene and Cotton Dust cases. In each there was a supportive agency which believed it was required to act without cost/benefit analysis, there was an affected industry which believed the contrary, and the judiciary was in substantial disagreement and disarray on the issue of just what Congress intended. Justice Marshall in dissent in the Benzene case charged the plurality with ignoring "the plain meaning of the Occupational and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy."[144] Obviously there is basis for disagreement on the legitimacy of this charge, but unquestionably a more precise statute would have materially reduced the risk of judicial manipulation of the kind alleged.

Arguably, the principal loss attributable to the uncertainty surrounding section 655(b)(1) was time and resources until the Supreme Court resolved the issue in the Cotton Dust case by finding that consideration of feasibility and cost/benefit analysis were not synonymous and that Congress did not require the latter. But the question of what the Court would have done if the agency had interpreted the statute as requiring cost/benefit analysis presents an intriguing hypothetical. Certainly the probability is greater that the Court would have supported the agency interpretation, and if so, this accentuates the point that specificity and clarity are desirable in the design of statutory barriers.

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[141] American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).

[142] *Id.* at 509.

[143] *Id.*

[144] Industrial Union Dep't v. American Petroleum Inst., 448 U.S. at 688.

The Cotton Dust case also raises another intriguing aspect of the issue of the application of principles of cost/benefit analysis. Mandatory use of cost/benefit analysis must be as expressly required as a barrier to use. The Court indicated that Congress must require cost/benefit analysis if an agency is to be required to employ it: "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. . . . Congress uses specific language when intending that an agency engage in cost-benefit analysis."[145] This void may be filled by other than congressional action. This is what Executive Order 12291 accomplished with respect to major rules, although the legality of this approach has been questioned.[146]

The implication is that if Congress does not require cost/benefit analysis, an agency is not inclined to employ it and the action does not pertain to a major rule subject to the Executive Order, the agency will not be forced to do so. If this is important to Congress, it should anticipate this and deal with the matter by express statutory requirement.

From the cases one discerns that the true statutory barrier to cost/benefit analysis, in contrast to the economist's perception, requires more than mere specificity of delegation. Although specificity may restrict the scope of cost/benefit analysis in precluding consideration of some otherwise available alternatives, there would appear to be a remaining range of alternatives for further and full application of the principles if an agency is so inclined. Thus specificity of delegation alone presents only a partial barrier. A full and true barrier would seem to require a clear expression of legislative intent, preferably on the face of the statute and at a minimum in its legislative history, before the courts will find that cost/benefit analysis is precluded.

B. *Food Safety*

Perhaps the most celebrated example of the statutory barrier to the application of principles of cost/benefit analysis is found in the

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[145] American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. at 510.

[146] *See, e.g.*, Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

Federal Food, Drug, and Cosmetic Act.[147] The Delaney Clause, as it is commonly known, is included in three separate provisions of the Act which concern food additives, animal drugs and color additives.[148] The Clause as it appears in the food additives provision is representative of the others; it provides with regard to issuance of food additive regulations that:

> No such regulation shall issue if a fair evaluation of the data before the secretary
> (A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: Provided, that no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal . . . .[149]

The purpose of the clause is clear. It precludes the approval of food additives shown to induce cancer in humans or animals. Furthermore, the courts have recognized the absolute nature of the prohibition. This is unlike some other important areas of regulatory policy within the Food and Drug Administration's (FDA) control. As the Court of Appeals for the District of Columbia Circuit observed in a case involving the animal drug, DES:

> Outside the *per se* rule of the Delaney Clause, the typical issue for the FDA is not the absolute safety of a drug. Most drugs are unsafe in some degree. Rather, the issue for the FDA is whether to allow sale of the drug, usually under specific restrictions. Resolution of this issue inevitably means calculating whether the benefits which the drug produces outweigh the costs of its restricted use.[150]

Others have concluded similarly that the strictures of the Delaney Clause are absolute. As Dr. Charles Black noted: "In short, the policy precludes the rational weighing of cost against benefit in the contemplation of any particular substance as a food additive."[151]

An absolutist view of the Delaney Clause merits some refinement. Peter Hutt and Richard Merrill have noted that although the Clause gives equal weight to animal and human studies and allows no opportunity to take the size of dose into consideration, certain statutory terms in the Clause are undefined and thus leave room for scientific judgment. Neither "induce," "cancer," nor "tests appropriate" are defined. They believe this means that "scientific judgment has played, and apparently was intended to play, an important role in the policy's application."[152] The result under this analysis is flexibility and discretion in determining whether the conditions of Delaney are met and none once it is determined they are.[153]

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[147] 21 U.S.C. §§ 301-92 (1982).

[148] *Id.* §§ 348(c)(3)(a), 360b(d)(1)(H), 376(b)(5)(B).

[149] *Id.* § 348(c)(3)(a).

[150] Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975, 993-94 (D.C. Cir. 1974). *See also* Bell v. Goddard, 366 F.2d 177, 181 (7th Cir. 1966) (Delaney Clause "is generally intended to prohibit the use of any additives which under any conditions induce cancer in any strain of test animal.").

[151] Blank, *The Delaney Clause: Technical Naivete and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084, 1111 (1984).

Indeed, Peter Hutt has written that much of the controversy surrounding the Delaney Clause is based on false premises. He suggests that it was never intended to be a statement of scientific principle, but rather one of public policy, that the public policy reflected in the Clause is in accord with the public policy of the food safety laws generally and that the FDA's position on food additives would be the same even without the Clause.[154] Hutt concludes that "the Delaney Clause is utterly irrelevant to current food safety policy . . . ."[155] The implication is that other food safety policies reflected in the Act would require actions comparable to those which the FDA has taken under the Delaney Clause.

The Hutt view is supported by the FDA's own position in its regulatory actions with respect to the artificial sweetener saccharin. In proposing to remove saccharin from food usage, the Commissioner emphasized that his actions were not based exclusively on the Delaney Clause, notwithstanding press reports to the contrary. He noted that the same result would be required under the Act's general safety requirements for food additives and that under these the FDA "is not empowered to take into account the asserted benefits of any food additive . . . ."[156] If so, the significance is that the statutory barriers in the food safety law are not confined to the Delaney Clause.

Nevertheless, the prevailing view and common denominator in these various positions seems to be that the Delaney Clause does serve as a statutory barrier to application of principles of cost/benefit analysis. And, whatever its perceived nature in the eyes of others, congressional behavior suggests that it considers it such. In

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[152] R. Merrill & P. Hutt, Food and Drug Law-Cases and Materials 78 (1980).

[153] *Id.*

[154] Hutt, *Public Policy Issues in Regulating Carcinogens in Food*, 33 Food Drug Cosm. L.J. 541, 542 (1978).

[155] *Id.* at 542.

[156] 42 Fed. Reg. 19996, 19999 (April 15, 1977).

1977, Congress found it necessary to move to prevent the impending FDA ban on saccharin. It was common knowledge that Congress was motivated in substantial measure by public perceptions of the benefits and utility of the artificial sweetener.[157] Even though Congress did not eliminate the statutory barrier, its moratorium and study decision had the effect of deflecting and deferring the impact of the Delaney Clause.[158] In this manner, benefits were taken into account.

Whether the Delaney Clause is viewed as a statement of scientific policy or a statement of public policy, it does seem to be immaterial from the perspective of the desirability of statutory barriers to cost/benefit analysis. In either case, the consequences appear to be the same. The Delaney Clause was based on the state of scientific knowledge and testing capabilities at the various times it was incorporated in the food additives, animal drug and color additives laws. At that time, for example, saccharin was considered generally recognized as safe and not even a probable candidate for application of the Delaney Clause. Later studies, however, demonstrated saccharin's capacity for inducing cancer in laboratory animals. The issue was drawn, and the agency could not consider its benefits in light of its costs. In general terms Congress had done this in the Delaney Clause without having saccharin in mind.

With this history in mind, a statutory barrier in an area requiring considerable expertise and state of the art medical and scientific judgments seems undesirable. This is aggravated when medicine and science are constantly expanding and improving in their ability to measure and predict the effects and consequences of use of substances in food.

Furthermore, the lessons of the Benzene and Cotton Dust cases discussed in the preceding part are highlighted by the Delaney Clause and its history. The Delaney Clause is an example of a true statutory barrier to cost/benefit analysis. It is characterized by much more than specificity of congressional action. On its face the Clause manifests an intent to preclude cost/benefit analysis, yet it falls short of specific and express preclusion. In that respect it may seem similar to numerous other specific limitations on agency discretion, which constitute at most partial statutory barriers. What does set the Delaney Clause apart is the language of the statute, buttressed by a legislative history and subsequent judicial and administrative record which makes clear that cost/benefit analysis is not to be employed in certain matters of food safety.

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[157] Saccharin Study and Labeling Act, Pub. L. 95-203, 91 Stat. 1452 (1977).

[158] Act of June 17, 1980, Pub. L. 96-273, 94 Stat. 536; Act of Aug. 14, 1981, Pub. L. 97-42, 95 Stat. 946.

C. *Control of Toxic Substances*

The Toxic Substances Control Act was enacted in 1976.[159] Its fundamental purpose was to regulate chemical substances and mixtures which present unreasonable risks of harm to health or the environment.[160]

Notwithstanding the public protection goals of the Act, Congress was cognizant of the costs in dealing effectively with toxic substances. Thus, in its statement of policy Congress declared that

> authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.
>
> (c) Intent of Congress.—It is the intent of Congress that the Administrator [of the Environmental Protection Agency (EPA)] shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.[161]

This congressional expression of policy and intent represents a sympathetic posture toward the costs as well as the benefits in the regulation of toxic substances. Many examples of the necessity and desirability of administrative weighing of costs and benefits are included in the statute.

An important exception to this basic attitude and approach is the statutory provision dealing with polychlorinated biphenyls (PCBs):

> (1) Within six months after January 1, 1977, the Administrator shall promulgate rules to—
>
> (A) prescribe methods for the disposal of polychlorinated biphenyls,
>
> (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

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[159] Act of Oct. 11, 1976, Pub. L. 94-469, 90 Stat. 2003, *codified at* 15 U.S.C. §§ 2601-29 (1982).

[160] 15 U.S.C. § 2601(a) (1982) (findings). *See* S. Rep. No. 94-698, 91st Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 4491.

[161] 15 U.S.C. §§ 2601(b)(3), (c) (1982).

> Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).
> (2)(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.
> (B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use . . . of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use . . . will not present an unreasonable risk of injury to health or the environment.
> (C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.
> (3)(A) Except as provided in subparagraphs (B) and (C)—
> (i) no person may manufacture any polychlorinated biphenyl after two years after January 1, 1977, and
> (ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.
> (B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such exemption if the Administrator finds that—
> (i) an unreasonable risk of injury to health or environment would not result, and
> (ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.
> An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.
> (C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one-half years after October 11, 1976.[162]

Although the statute does confer discretion in several important respects, the fundamental and most important application of principles of cost/benefit analysis has been made by Congress. It and not its delegate determined that PCBs lack sufficient merit, represent sufficient risk, and thus justify drastic governmental action. What this statute "imposes [is] a statutory ban on the manufacture, processing or distribution of 'polychlorinated biphenyls' ('PCBs'), subject to limited administrative exemption . . . ."[163]

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[162] *Id.* § 2605(e)(1),(2),(3).

[163] Dow Chem. Corp. v. Costle, 484 F. Supp. 101, 102 (D. Del. 1980).

An interesting characteristic of this statutory barrier is its "rolling" nature. Congress did not impose an immediate total ban of PCBs. Instead it prescribed a ban of increasing severity which was to unfold over a two and one-half year period, and it was in the unfolding of the ban that the Administrator was given some discretionary authority to relieve industry from its impact. The objective was nevertheless clear. As Congressman Broyhill observed in debate on this legislation, the statute

> sets out a timetable for regulating PCB's culminating in a ban on the processing or distribution in commerce of PCB's 2½ years after the effective date of this act. The purpose of this ban is to preclude the manufacture, processing or distribution in commerce of new PCB's or new equipment containing PCB's in 2½ years after the effective date of this act.[164]

Furthermore, the statute left much to the Administrator beyond implementation of the rolling ban. The widespread use and persistent nature of PCBs left much to be done in the future with respect to PCBs already in existence. The result was extensive administrative regulations pertaining to PCBs.[165]

Not surprisingly, some of these regulations came under attack as the Administrator attempted to be reasonable and practical, as a result of either his own inclinations, industry pressure or both. The result was a test of the efficacy of the statutory barriers to cost/benefit analysis in connection with the PCB problem.

Not long after their promulgation the Environmental Defense Fund (EDF) instituted a proceeding for judicial review of various provisions of the EPA's rules concerning PCBs. Specifically, EDF challenged the validity of EPA's classification of certain uses of PCBs as "totally enclosed," its exclusion from regulatory control of materials containing PCBs in concentrations of fifty parts per million or less, and its authorization of continuation of certain uses not totally enclosed.[166]

With respect to the issue last mentioned, EDF contended that the Administrator had employed the wrong standard in authorizing certain non-totally enclosed uses and making a determination that these uses would not involve unreasonable risk to health or the environment.[167] The court concluded that it was reasonable and permissible for the Administrator to bring to bear the standard for risk assessment generally applicable to other chemical substances under the Act. The latter affords an opportunity for cost/benefit analysis, and the court noted that "this formulation, which considers a broad range of benefits and costs of the ban and use authorization, is entirely consistent with the . . . requirement that the Administrator consider the economic and social impact of his actions."[168]

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[164] 122 Cong. Rec. 11,344 (1976).

[165] *See generally* 40 C.F.R. §§ 761.1-761.185 (1983). The regulations address such matters as definitions, prohibitions, authorizations, markings, storage and disposal of PCBs.

[166] Environmental Defense Fund, Inc. v. EPA, 636 F.2d 1267, 1269 (D.C. Cir. 1980).

[167] *Id.* at 1275. See 15 U.S.C. § 2605(c)(1) (1982), which permits "reasonably ascertainable economic consequences . . . after consideration of the effect on the national econ-

The court was not speaking of the PCBs provision in its entirety. The opportunity for cost/benefit recognized here was confined to a limited area in which it was reasonable to conclude that Congress had intended that economic consequences be taken into account. The decision in other respects established the true strength of the statutory barriers in this provision.

When the court turned its attention to the fifty parts per million line which the Administrator had drawn for regulatory purposes, it was necessary to deal with the statutory language which addressed "any polychlorinated biphenyl." The EPA had selected this line for enforcement convenience and due to its fear of adverse impact on commercial products and "municipal sludges."[169] Although the court was reluctant to take the language literally "to require EPA to regulate every molecule of PCB . . . absent support in the legislative history,"[170] it did conclude that Congress did intend to control non-ambient sources of PCBs. In this light and as to these sources, the fifty parts per million line was impermissible. Congress had expressed its will that even "inadvertent commercial production of PCBs . . . be regulated,"[171] and the agency had no choice in the matter. The statutory barrier to agency application of principles of cost/benefit analysis was to be honored, although Congress required judicial assistance to assure that its intent was realized.

The provisions concerning PCBs in the Toxic Substances Control Act in most respects represent a statutory barrier to application of principles of cost/benefit analysis in the form of a ban. The PCB problem was perceived by Congress as too obvious, too immediate and too important to leave to the agency.

Yet the terms of the statute illustrate the difficulty of imposing

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omy, small business, [and] technological innovation . . ." to be taken into account.

[168] 636 F.2d at 1276-77.

[169] *Id.* at 1280.

[170] *Id.* at 1281.

[171] *Id.* at 1282. The court also found that the evidence in the record was insufficient to support the classification of certain uses as totally enclosed. *Id.* at 1284-86.

an immediate ban. The rolling nature of the PCBs provisions demonstrates that immediate imposition of a ban, especially in a case involving a longstanding and long-used substance, may be impossible. The costs of the ban must be considered no matter how beneficial the outcome. For this reason the phased-in ban is not surprising. It simply reflects the congressional inclination to be realistic and spread at least some of the costs into the future. Consequently, Congress found it necessary to give some discretion to the agency to oversee this aspect of the ban. But the significant point is that the terms of the ban and the corresponding weighing of costs and benefits were established by Congress and not the agency.

The PCBs provision also illustrates that a statutory barrier may be undesirable from the perspective of Congress in that failure is more conspicuous. If an agency has authority to engage in cost/benefit analysis, it may not be as obvious that the stated objective has not been or never will be reached. And, when failure is perceived in the efficacy of a statutory barrier, Congress must shoulder more of the blame than is customary when agencies are criticized. As the court in the case just discussed noted:

> We feel constrained to add one final note to emphasize our concern in this case. Human beings have finally come to recognize that they must eliminate or control life threatening chemicals, such as PCBs, if the miracle of life is to continue and if earth is to remain a living planet. This is precisely what Congress sought to do when it enacted section 6(c) of the Toxic Substances Control Act. Yet, as we find that forty-six months after the effective date of an act designed to either totally ban or closely control the use of PCBs, 99% of the PCBs that were in use when the Act was passed are still in use in the United States. With information such as this in hand, timid souls have good reason to question the prospects for our continued survival, and cynics have just cause to sneer at the effectiveness of governmental regulation.[172]

It seems difficult to attribute this only to agency ineptitude and to resolve it by scheduling oversight hearings. Congress itself struck the balance between costs and benefits in the statute, and certainly it sided significantly with health and the environment as to PCBs. But if critics deem its efforts inadequate, Congress must bear the primary responsibility and answer the critics. This may be desirable or undesirable, depending on one's perspective and position of the moment.

The treatment of PCBs under the Toxic Substances Control Act represents an absolute statutory barrier as to the ban and, as

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172. *Id.* at 1286-87.

noted, a "rolling" barrier in its implementation. As in the case of the Delaney Clause, the fact of the barrier's existence cannot be attributed exclusively to the specificity of the statute. One also must look to the other provisions in the statute which intentionally require cost/benefit analysis in other substantive settings.

D. *Mine Closure*

By nature mines are dangerous workplaces; it is thus not surprising that congressional initiative, public pressure, or both have addressed the matter of mine safety. The most obvious and drastic course of action with respect to an unsafe mine is to close it, permanently or until such time as the unsafe conditions are rectified. In the history of mine controls in this country, Congress has considered and in various ways implemented these alternatives. In the process, it has considered and sometimes employed the statutory barrier to cost/benefit analysis by agencies entrusted with overseeing mine safety.

The particular statutory barriers presented in this part provide an opportunity to observe Congress experimenting with the statutory barrier as a means of administrative control. The record indicates the difficulty of controlling administrative discretion even in the presence of a statutory barrier and suggests that the mere existence of an agency constitutes a grant of considerable discretionary power which, as a practical matter, is difficult if not impossible to control.

Congressional interest in mine safety and regulation is not new. A mining bill was proposed as early as 1865, but little was done until the early twentieth century when a series of mine disasters led to the establishment of the Bureau of Mines in 1910.[173] In 1966, Congress enacted the Federal Metal and Nonmetallic Mine Safety Act; it was motivated by its concern for safety in the workplace: "The number and severity of the injuries experienced each year by persons employed in the extractive industries should be alarming to an America that prides itself on its . . . concern for the welfare of its citizens."[174]

The 1966 Act contained a provision illustrative of the statutory barriers. Section 727(a) provided:

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[173] *See* S. REP. No. 95-181, 95th Cong., 1st Sess. 1 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401.

[174] S. REP. No. 1296, 89th Cong., 2d Sess. 5 (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2846, 2850.

> If, upon any inspection or investigation of a mine which is subject to this chapter, an authorized representative of the Secretary finds that conditions or practices in such mine are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated, such representative shall determine the extent of the area of such mine throughout which the danger exists, and thereupon issue an order requiring the operator of such mine to cause all persons, except the following persons [as identified in sec. 727(a)(1)] whose presence in such area is necessary to eliminate the danger described in such order, to be withdrawn from, and to be debarred from, entering such area.[175]

The "Secretary" in this instance was the Secretary of the Interior.[176]

What Congress sought to accomplish with this provision was a mandate for mine closure under certain prescribed circumstances. The agency necessarily was granted the task of determining when conditions could reasonably be expected to cause death or serious physical harm and whether these conditions existed only in part or all of a mine, but the statute conferred no express discretion to weigh the costs of closure versus the benefits of safety. The administrative function delegated was not one of making rules to deal with mine safety under a broad delegation of authority; rather it was one of inspection to identify specified dangers and enforcement.

In 1977, section 727(a) and the remainder of the 1966 Act were repealed by the Federal Mine Safety and Health Amendments Act which themselves represented amendments to the Federal Coal Mine Health and Safety Act of 1969.[177] In practice, the Metal and Nonmetallic Mine Safety Act had come to be viewed as more advisory in nature; its ineffectiveness was noted by the Senate which determined that in 1975, nine years after its enactment, there had not been one appeal from an adverse determination of the Secretary.[178] Obviously, the affected industry had not been particularly disenchanted with enforcement of the 1966 Act.

The Senate concluded that in part this situation was attributable to a conflict inherent in assigning responsibility for mine safety to the Secretary of the Interior. The desire to increase production was in tension with the need to interrupt production for safety reasons. Thus, one of the changes under the 1977 Act was to transfer mine safety to the jurisdiction of the Secretary of Labor because "no conflict could result if the responsibility for enforcing and administering the mine safety and health law was assigned to the Department of Labor since that department has as its sole duty the protection of workers and insuring of safe and healthful working conditions."[179]

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[175] Act of Sept. 16, 1966, Pub. L. No. 89-577, § 8(a), 80 Stat. 775, *repealed by* Act of Nov. 9, 1977, Pub. L. No. 95-164, 91 Stat. 1322.

[176] *Id.* § 721(d).

[177] Act of Nov. 9, 1977, Pub. L. No. 95-164, 91 Stat. 1322, *codified at* 30 U.S.C. §§ 801-78 (1982). The Federal Coal Mine Health and Safety Act was enacted in 1969 and in some measure reflected disenchantment with the efficacy of the Metal and Nonmetallic Mine Safety Act. *See* Act of 1969, Pub. L. No. 91-173, 83 Stat. 742-43.

[178] S. REP. No. 95-181, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3406.

The role previously performed by section 727(a) was assigned to section 814 under the 1977 Act. The relevant portions of the latter statute are not without statutory barriers to application of principles of cost/benefit analysis, although their overall impact suggests less specificity of congressional action than section 727(a) and greater reliance on the presumed objectivity and independence of the Secretary of Labor. These relevant subsections of the new provision generally encompass what section 727(a) once did.[180] There

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[179] S. REP. NO. 95-181, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3405.

[180] *See* 30 U.S.C. §§ 814(a), (b), (d)(1) (1982):

> (a) *Issuance and form of citations; prompt issuance*
> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation . . . he shall, with reasonable promptness, issue a citation to the operator. . . . [T]he citation shall fix a reasonable time for abatement of the violation . . . .
>
> (b) *Follow-up inspections; findings*
> If, upon any follow-up inspection . . . an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agency to immediately cause all persons, except those referred to in subsection (c) [comparable to section 727(a)(1) of the 1966 Act and is confined to persons necessary for dealing with the conditions to be abated] to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
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> (d) *Findings of violations; withdrawal order*
> (1) If, upon any inspection . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator . . . . If during the same inspection or any sub-

is little doubt that the new provisions afford greater administrative discretion than the 1966 Act. Close inspection, however, of the statute reveals that significant statutory barriers remain.

Section 814(a) provides for citation upon finding of a violation with a reasonable time for abatement, and section 814(b) provides for closure of the mine if on follow-up inspection the violation in the original citation has not been totally abated. The latter provision clearly provides no opportunity for inspectional cost/benefit analysis in the course of a follow-up inspection; however, section 814(a) might be taken as precluding closure of a mine during an initial inspection, no matter how dangerous and life-threatening the violation—that a reasonable time must always be allowed for abatement and more than a moment is needed to be reasonable. A close reading of section 814(d)(1) suggests the contrary. The manner in which the term "imminent danger" is employed in that provision suggests that even on an initial inspection a determination of imminent danger requires immediate closure of a mine. There is no opportunity for the inspector to engage in cost/benefit analysis just as there was none under the 1966 Act.

The difficulty with this interpretation is that until the 1977 amendments, section 814(a) included an "imminent danger" standard for mine closure.[181] This was deleted in 1977. Perhaps the continued inclusion of this language in section 814(d)(1) was more oversight than a continuation of the policy only with respect to withdrawal orders under that section. But it seems likely that the "reasonable time" to be allowed under section 814(a) for abatement could be as little as a moment when mine roofing supports are on the verge of collapse. If so, the absence of the "imminent danger" standard may be of little consequence, although determining reasonableness carries with it a degree of discretion. It is for that reason somewhat less a statutory barrier.

Section 814(d)(1) also contains its own version of a statutory barrier, and even during an initial inspection the inspector may

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> sequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such violation has been abated.

Id.

[181] Act of December 30, 1969, Pub. L. No. 91-173, Title 1, § 104, 83 Stat. 742, 750.

have no choice but to issue a withdrawal order. If he finds an unwarrantable violation which threatens safety or health, although not imminently dangerous, he must include such in the citation issued. But if during that inspection he finds another unwarrantable violation, the inspector must issue a withdrawal order. Admittedly there appears to be some discretion in determining what constitutes an "unwarrantable" violation, but there is none concerning what must be done once that finding is made. The withdrawal order must be issued and the mine closed.

It should be noted that the intensity and efficacy of the statutory barrier appear to be a function of the nature of the violation which might precipitate a withdrawal order. In an early case under the Coal Mine Health and Safety Act not involving imminent danger, the court found that the statute afforded the discretion to hold an administrative hearing before closure of a mine; otherwise the Act "would indeed face serious claims of deprival of due process."[182] In such cases, not involving imminent danger, it cannot be said that the statute constitutes a statutory barrier in the course of inspection if closure of the mine must await an administrative hearing.

In contrast, a true statutory barrier to cost/benefit analysis by the inspector would exist only if the conditions at the mine are of a magnitude sufficient to require immediate action without a prior hearing. What is required to constitute a true statutory barrier is a situation in which the inspector has no choice but to close the mine immediately.[183]

What the 1977 amendments appear to have done is reduce the clarity and efficacy of the statutory barriers to discretionary cost/benefit analysis in the course of mine inspections. But, as just discussed, the statutory barriers were not eliminated entirely. There are still those situations in which it is clear that the inspector has no alternative except to order immediate withdrawal from a mine.

Indeed, in one instance the effect of the replacement of the Metal and Nonmetallic Mine Safety Act by the 1977 amendments was to add a new statutory barrier which is as clear and unequivocal as any now in the statute. Section 814(g)(1) provides:

> If, upon any inspection or investigation . . . the Secretary or an authorized

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[182] Lucas v. Morton, 358 F. Supp. 900, 903 (W.D. Pa. 1973).

[183] Under traditional notions of summary administrative action in emergency situations it would be permissible and consistent with due process for the hearing to take place after closure of the mine. *See, e.g.*, Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975).

> representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 825 of this title, the Secretary or an authorized representative shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 825 of this title.[184]

Here there is no uncertainty. The mine's immediate need for the untrained miner is not relevant. The inspector must order withdrawal from the mine.

The interesting feature of the various statutory barriers concerning mine closure is the timing of their impact. If applicable, the barrier precludes cost/benefit analysis at one of the earliest phases of the administrative process. These are not barriers limiting the agency in the course of rulemaking or adjudication of individual cases. Rather, they confine discretion to the early phase of investigation and inspection.

Furthermore, these are statutory barriers the effect of which is felt most drastically by agency operating personnel. It will not be the Secretary of Labor who will be at the mine site; it will be a line employee. Consequently, the barrier may be especially useful. It reduces uncertainty for the inspector because what is expected is often clear. It may also be useful in reducing pressure from mine operators for the inspector to engage in ad hoc cost/benefit analysis during an inspection. Opportunities for such, if they exist at all, will arise later in the administrative process and presumably at a higher level.

None of this, however, explains why Congress itself should create these barriers. The agency should be capable of doing the same. Yet when Congress creates the barrier it is more difficult to alter and the agency itself may be relieved of pressure to reach contrary results administratively. This could be the principal advantage of statutory barriers to cost/benefit analysis in connection with mine inspections.

These statutory barriers, however, are unlike those reflected in the Delaney Clause or in the Toxic Substances Control Act with respect to PCBs. The barriers here are more implicit in nature. There is nothing to indicate that Congress made a conscious decision to preclude cost/benefit analysis; rather it establishes firm guidance on what was to be done in certain situations in the course of mine inspections, notwithstanding any pleas from a mine operator to "consider the costs." This does not seem to make it any less a barrier. Certainly the economist *would* consider it such, although a lawyer may not. But the mine closure provisions involve more than prosecutorial discretion. As with the Delaney Clause, which dictates that under certain defined circumstances a food additive must be banned, the mine closure provisions dictate that under certain circumstances the mine must be closed without regard to cost. Whatever discretion remains is merely that residual "discretion" to ignore the closure mandate with the hope that the abuse of discretion will not be noticed and challenged.

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[184] 30 U.S.C. § 814(g)(1) (1982).

E. *Commodity Marketing Quotas*

The most complex and frequently amended statutory barriers to cost/benefit analysis included in these case studies are those found in the Agricultural Adjustment Act of 1938.[185] As a byproduct of this statute, terms such as "parity," "price support," "acreage allotment," and commodity "marketing quota" have become entrenched in the lexicon of American agriculture. It is not an unimportant statute.

The purpose here is to identify a few of the statutory barriers representative of the legislative approach taken in the 1938 Act, although it is worth emphasizing that throughout the Act Congress elected to specify in considerable detail just what the Secretary of Agriculture is entitled to do and how he is to do it. This is not to say that no discretion is conferred on the agency, but this statute is at the opposite end of the spectrum from those where Congress in broad terms charges an agency to deal with a matter "in the public interest, convenience and necessity."

The general intent of Congress in enacting the Agricultural Adjustment Act is reflected in its statutory declaration of policy which provides:

> It is declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cot-

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[185] *See generally* 7 U.S.C. §§ 1281-1393 (1982).

> ton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.[186]

In its efforts to achieve its stated objectives Congress addressed each of the specified crops individually, and made specific findings concerning the effects on interstate and foreign commerce and the need for regulation. With respect to wheat it emphasized the large number of farmers producing wheat, the undesirable and harmful consequences of "abnormally excessive and abnormally deficient supplies,"[187] the inadequacy of normal market forces in avoiding these problems and thus the necessity for federal intervention, and the need for fair prices for consumers and farmers.

Under the statutory scheme for wheat the Secretary of Agriculture is empowered to declare each year that supplies are likely to be excessive in the absence of a marketing quota program and, for that reason, to institute such a program.[188] The Secretary is given the further power to proclaim a national acreage allotment for each crop of wheat based on the number of acres necessary to produce the quantity set under the national marketing quota.[189]

Section 1334 is central to the statutory scheme and addresses apportionment of the national acreage allotment for wheat. Section 1334 has been amended with remarkable frequency—some twenty-six times.[190] In its present form the statute guides the Secretary carefully through the process of allotment. It specifies that reserves are not to exceed one percent and that the allotment among the states must be based on the preceding year's allotment, subject to adjustment to assure fair and equitable apportionment.[191] The entire section and its intricacies need not be repeated here, but throughout one finds instances in which Congress instructs that an allotment must be "less by at least 20 percentum," "at least 10 percentum," "not in excess of one million acres," not "in excess of one-half of such county average ratio" and so on. The specificity and complexity are remarkable, and in each instance the effect is to limit the discretion of the Secretary in his efforts to achieve the objectives of the Act. Each in its fashion stands as a potential barrier to cost/benefit analysis.

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[186] 7 U.S.C. § 1282 (1982).

[187] *Id.* § 1331.

[188] *Id.* § 1332.

[189] *Id.* § 1333.

[190] *See* 7 U.S.C.A. § 1334 (1973 & 1983 Supp.).

[191] 7 U.S.C. § 1334(a) (1982).

Section 1334 has proved, as noted, to be a provision requiring constant adjustment and "fine tuning." Throughout this process it seems that two considerations have necessitated change—the increasing cost of the allotment program and the increasing productive capacity of wheat producers. For example, in 1953 Congress passed temporary legislation raising the national allotment to sixty-one million acres to avoid reducing planted acreage by almost thirty percent. This was in response to the effect of the statute which would have provided an allotment of only fifty-five million acres. Congress concluded that putting a large number of wheat farmers out of business was in the best interests of neither the nation nor the world.[192] But the significant point for present purposes is that the nature of the statute required legislation and not administrative action to make the necessary assessment of costs versus benefits.

In 1958 the section was amended to make adjustments made necessary when the apparently unanticipated effects of a 1957 amendment became evident.[193] The 1957 statute provided that any acreage seeded to wheat for harvest as grain for 1958 and thereafter in excess of allotments would not be considered in setting future acreage allotments.[194] The 1958 amendment prevented application of this principle to the 1958 crop because farmers did not have adequate notice of the change when they voted on 1958 acreage allotments and when they planted their winter acreage. In effect the 1957 statute had changed the rules in midgame, and the 1958 legislation corrected the problem. It took congressional action to make the correction.

On occasion Congress has suspended the applicability of section 1334 and moved on to experiment with other means of dealing with production and supply problems in wheat as well as other agricultural commodities. The section was suspended and declared inapplicable for the period from 1971 to 1977.[195] Congress took similar suspending action and declared the section inapplicable for the 1982-1985 wheat crops.[196]

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[192] S. REP. No. 520, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 1877.

[193] Act of April 4, 1958, Pub. L. No. 85-366, § 1, 72 Stat. 78.

[194] Act of Aug. 28, 1957, Pub. L. No. 85-203, § 2, 71 Stat. 477.

[195] Act of Nov. 30, 1970, Pub. L. No. 91-524, Title IV, § 404(1), 84 Stat. 1366, *as amended*, Act of Aug. 10, 1973, § 1(11), 87 Stat. 229.

This general description of the commodity marketing quota and acreage allotment program for wheat is illustrative of congressional programs for other commodities such as tobacco, cotton, corn and rice.[197] Typical of each is a high degree of specificity in the congressional mandate to the Secretary of Agriculture and an attendant reduction in administrative discretion and the opportunity to engage in cost/benefit analysis.

Perhaps it is imperative in the politics of agriculture that Congress take an active and specific role in the formulation of agricultural policy. It may be impolitic to delegate agricultural problems to an administrative official without specific guidance. It may be that the Department of Agriculture is quite content to have these sensitive judgments made by Congress. It may be that the Department would not want to engage in cost/benefit analysis even where it might. However, the history of congressional control over the wheat markets suggests that the political realities may not produce the most efficient and effective agricultural policy.

The traditional approach has been for Congress itself to weigh the costs and benefits of different approaches to agricultural problems, to design a statute to reflect the balance struck and to delegate lesser matters to the Secretary of Agriculture for implementation of the policies it has set. As an abstract proposition this approach has some appeal. It is certainly more democratic as well as politically realistic, but the frequent necessity for statutory change indicates that these matters require a level of continuing supervision in the weighing of costs and benefits which an agency is more able to provide.

Too much significance should not be attached to the fact that Congress did devote attention to the need for statutory amendments on a regular basis. There is no way of being certain that it did so in all cases where it was needed; Congress may have been simply doing other important things and turning to marketing quotas only when absolutely necessary. In addition, the number of amendments is probably a symptom of underlying problems. It may be that intrusive economic regulation is especially disrupted by statutory barriers because of the complexity and fluidity of the economy itself, and if such regulation is desired, statutory barriers should be avoided.

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[196] Act of Dec. 22, 1981, Pub. L. 97-98, Title III, § 303, 95 Stat. 1227.

[197] *See* 7 U.S.C. §§ 1311-30 (1982) (tobacco); *id.* §§ 1311-16 (cotton); *id.* §§ 1321-30 (corn); *id.* §§ 1351-56 (rice).

These barriers are another example of implicit rather than explicit barriers which are a product of the specificity of the statute without evidence that Congress intentionally constricted the Department's capacity to engage in cost/benefit analysis. Nevertheless, this is an area of economic policy and regulation in which cost/benefit analysis is necessary and even inevitable and in which Congress has elected to perform the fundamental analysis itself.

F. *Prevailing Wage Rates in Government Contracts and Grants*

A common provision in statutes pertaining to government contracts and grants is one which establishes a minimum for wages to be paid by outside contractors and grant recipients. Generally the wages are tied to a determination of locally prevailing rates.

Provisions of this nature are found in a variety of statutes, ranging from contracts and grants relating to Indians,[198] pollution prevention grants,[199] contracts for conversion of leased postal facilities,[200] to Housing and Urban Development contracts and subcontracts.[201] However, the precedent, model and primary source of the prevailing wage rate principle throughout federal law is the Davis-Bacon Act.[202]

The Davis-Bacon Act was enacted on March 3, 1931. Originally the objective was an emergency price measure. The history of the legislation indicates that the primary objective was to provide some form of relief from abuses in the extensive building and construction programs created in response to the Depression.[203] Debate focused on unscrupulous contractors who would submit bids based on cheap "imported" labor to obtain government contracts. The concerns voiced were basically twofold. First, there was the obvious concern on the effect of such bids on local workers and the impact of their unemployment on taxes and domestic life. Second, there was concern with the treatment and conditions which the imported workers were often forced to endure. Obviously there was some opposition to this legislation, but generally it had considerable support. Proponents pointed to the fact that many municipalities and states already had similar statutes.[204]

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[198] 25 U.S.C. §§ 450(e), 1612(b)(1) (1982).

[199] 33 U.S.C. § 1372 (1982).

[200] 39 U.S.C. § 410(d) (1982).

[201] 42 U.S.C. § 3310 (1982).

[202] Act of March 3, 1931, ch. 441, 46 Stat. 1494, *codified at* 40 U.S.C. § 2762 (1982).

[203] 74 Cong. Rec. 6505 (1931).

In 1964 the Davis-Bacon Act was amended to take into account the increasing significance of fringe benefits in total employee compensation since 1931.[205] Thus, the amendments allowed consideration of benefits such as group life insurance, group hospitalization, and disability programs.[206] The view was that if these benefits were not included, only part of compensation would be reflected in the prevailing wage rates. Yet there was concern that the amendment would adversely affect the government by way of increased costs.[207] The Senate Committee acknowledged that there would be increased costs, including administrative costs in the Department of Labor in making prevailing wage determinations. In 1963, for example, the Department issued 46,000 prevailing wage determinations involving 5,000,000 job classifications. But the Committee believed that administrative improvement such as the creation of a Wage Appeals Board with jurisdiction over such cases would mitigate the financial impact of the amendments.[208] In any event it seems certain that Congress believed the benefits of prevailing wage rate controls outweighed any additional costs.

Section 276a, the central provision in the Davis-Bacon Act provides:

> The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . .; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of pay-

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[204] *Id.* at 6510.

[205] Act of July 2, 1964, Pub. L. No. 88-349, 78 Stat. 238, *codified at* 40 U.S.C. § 276a(b) (1982).

[206] 1964 U.S. CODE CONG. & AD. NEWS 2341 (citing S. REP. No. 963, 88th Cong., 2d Sess. (1964)). *See* 40 U.S.C. § 276a(b) (1982).

[207] 1964 U.S. CODE CONG. & AD. NEWS 2341, 2342 (citing S. REP. No. 963, 88th Cong., 2d Sess. (1964)).

[208] *Id.* at 2343.

> ment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid . . . and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.[209]

The sanctions for failure to comply with these prevailing wage rate requirements include termination of the contract,[210] payment of excess costs incurred by the government in completion of the terminated contract project,[211] payment of the amounts owed laborers and mechanics from accrued payments otherwise due the contractor,[212] and a ban on any other contracts with the government for three years.[213]

These provisions represent a pervasive and significant statutory barrier to the application of principles of cost/benefit analysis. No matter how attractive the prospect of substantial savings on government contracts by retaining contractors who pay less than prevailing wages, an agency has little discretion to favor savings to the government over prevailing wages to workers. This is consistent with the purposes of the Davis-Bacon Act which "was not enacted to benefit contractors [and indirectly the public fisc], but rather to protect their employees from substantial earnings losses by fixing a floor under wages on Government projects."[214] It was designed to protect workers from those contractors inclined to import cheap labor to work on government contracts.[215]

Nevertheless, the statute is not without opportunity for the exercise of discretion. There is a degree of discretion in the contracting agencies as to applicable job classifications, as established by the Secretary. This is subject to review by the Secretary. There is also discretion inherent in the Secretary's establishment of classifications and prevailing wage rates.[216] However, this discretion prevails over a relatively narrow range within the framework of the statutory barrier.

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[209] 40 U.S.C. § 276a (1982).

[210] *Id.* § 276a-1.

[211] *Id.* Should the accrued payments prove insufficient, the statute specifies that the laborers and mechanics have a right of action against the contractor. *Id.* § 276a-2(b).

[212] *Id.* § 276a-2(a).

[213] *Id.* See generally Warner, *Congressional and Administrative Efforts to Modify or Eliminate the Davis-Bacon Act*, 10 W. STATE L. REV. 1 (1982), for a discussion of the legislative history of the Act and recent administrative and legislative efforts to alter or repeal it.

[214] United States v. Binghamton Const. Co., 347 U.S. 171, 176-77 (1954). *See also* Building and Const. Trades' Dep't v. Donovan, 712 F.2d 611, 613-15 (D.C. Cir. 1983).

[215] *E.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754, 774-80 (1981); Tennessee Roadbuilders Ass'n v. Marshall, 446 F. Supp. 399, 400-01 (M.D. Tenn. 1977).

It is established that there is no discretion to apply or not apply the Act; if it does apply, it must be enforced.[217] Furthermore, the ability of a contracting agency or the Secretary to proceed in an area within the reach of the Act in a manner inconsistent with its purposes is tightly circumscribed.

Recently the limits and strength of this statutory barrier and the corresponding limits on agency discretion have been tested in efforts by the Department of Labor to modify traditional prevailing wage rate principles for the purpose of effecting cost savings. This raised the question of whether the prevailing wage rate statute did in fact preclude cost/benefit analysis. The judiciary was compelled to resolve the matter.

The controversy arose when new regulations were promulgated by the Secretary of Labor. The court of appeals described the effect of the changes:

> Three of the new regulatory provisions of concern here would alter the method for finding the prevailing wage. Another set of regulations would allow federal contractors far greater freedom to use semi-skilled helpers on projects than has previously been permitted. The Secretary asserts that this expanded use of helpers would better reflect the practice on private projects. The fifth provision is intended to ease the regulatory burden on federal construction contractors by reducing the detail required in their weekly submissions to the government regarding wages. All of the regulations under challenge are expected to reduce federal construction costs; the Secretary has estimated that the last two provisions alone would save the government or its contractors about $463 million per year.[218]

The district court which first considered the regulations was more direct: "The new regulations will permit precisely that which Congress intended to halt in 1935."[219]

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[216] *See, e.g., Universities Research Ass'n,* 450 U.S. at 757-61, 771-83; North Ga. Bldg. & Const. Trades Council v. Goldschmidt, 621 F.2d 697, 701-05 (5th Cir. 1980); Associated Builders & Contractors of Texas Gulf Coast, Inc. v. United States Dep't of Energy, 451 F. Supp. 281, 283 (S.D. Tex. 1978).

[217] *Cf. Universities Research Ass'n,* 450 U.S. at 759-60.

[218] Building & Const. Trades' Dep't v. Donovan, 712 F.2d 611, 613 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 975 (1984).

[219] Building & Const. Trades' Dep't v. Donovan, 543 F. Supp. 1282, 1285 (D.D.C.

The Secretary had determined that the cost to the government of prevailing wage rates in government contracts now outweighed the benefit of higher wages and thus, through the new regulations, was attempting to strike a new balance. Seventeen unions asserted that this was contrary to the principles of the Davis-Bacon Act.

The district court agreed with the unions and observed:

> It is not for the Court to judge whether the basic policy decision to prefer wage floors over expense to the government was or is wise. More to the point, it is not for the Secretary of Labor or his subordinates to make that judgment. Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress.[220]

The preceding quote is taken from the district court's memorandum opinion in support of issuance of a preliminary injunction restraining enforcement of the rules. Subsequently the court considered the matter again on cross motions for summary judgment and permanently enjoined enforcement of the new rules, with the exception of the rule which raised the percentage of employees in each class of laborers and mechanics for purposes of defining prevailing wage rates.[221] Yet generally and not surprisingly the statutory barrier prevailed in the district court.

In a number of important respects the result was similar in the court of appeals, but the Secretary was successful on some issues. The court of appeals agreed with the district court that the elimination of the thirty percent rule was within the Secretary's discretion.[222] It was, however, more selective concerning the other issues in the case. It reversed on the aspect of the rules requiring that urban and rural areas not be combined in wage determinations[223] and concluded that the Secretary's position was consistent with legislative intent because he had been given sufficient discretion to make the choice.[224] It also concluded that the statute allowed the Secretary to exclude wages paid on federal projects in the computation of prevailing wages, notwithstanding prior administrative practice to the contrary.[225]

Concerning the treatment of helpers under the new rules the court of appeals both agreed and disagreed with the district court.

1982).

[220] *Id.* at 1291.

[221] Building & Const. Trades' Dep't v. Donovan, 553 F. Supp. 352 (D.D.C. 1982).

[222] Building & Const. Trades' Dep't v. Donovan, 712 F.2d 611, 616 (D.C. Cir. 1983).

[223] *Id.* at 633.

[224] *Id.* at 617-19.

[225] *Id.* at 619-22.

In its simplest terms the issue was whether lower paid helpers could effectively replace higher skilled and paid workers in prevailing wage determinations. Part of what the Secretary wanted to do was considered inconsistent with the purposes of the Act, but an expanded definition of helpers was allowed.[226]

The district court was considerably more supportive of the statutory barriers than the court of appeals. The former was influenced by the administrative as well as legislative history of the Act.[227] Yet even though the court of appeals decision afforded greater opportunity for the sway of cost/benefit analysis in the agency, it did so within a range. Even its decision upheld the basic precepts and underlying philosophy of Davis-Bacon, and the fundamentals of the statutory barrier prevailed.

The statutory barriers to cost/benefit analysis in the prevailing wage rate statute illustrate that the specificity of a statute may determine the efficacy of the barrier. If some measure of discretion is granted, there will be an opportunity for agency departure from congressional intent.

In this instance the principles of the barrier were honored by the agency and the courts for over four decades. Yet when the Secretary attempted to introduce principles of cost/benefit analysis through rulemaking, the Secretary's margin of discretion permitted some whittling away at the underlying intent of Congress. The court of appeals was supportive of the Secretary in at least some respects with the effect that greater weight is now placed on governmental costs than on the benefits to workers.

The message for Congress is that a modicum of discretion granted in conjunction with a statutory barrier may provide the opening for the introduction of a degree of cost/benefit analysis by the agency. Thus, if Congress wishes to assure that the balance it has struck between costs and benefits is not disturbed, it should eliminate discretion whenever possible. If it cannot eliminate discretion, it should at least eliminate any avoidable ambiguity in the statute. The Delaney Clause and its accompanying legislative history provide a contrasting model for how this can be accomplished.

The prevailing wage rate statute is instructive in other respects. This barrier clearly was not created by Congress because the agency was not capable of weighing the costs and benefits in setting wages under government contracts. The task was one within the competence of the agency. But more importantly it was a matter within the competence of Congress. Expertise is not pertinent to determining that there must be limits to competition in the wages reflected in government contracts.

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[226] *Id.* at 622-30. The court also affirmed the district court in declaring invalid a simplified method for contractor reporting. *Id.* at 630-33.

[227] *See generally* Building & Const. Trades' Dep't v. Donovan, 553 F. Supp. 352 (D.D.C. 1982); Building & Const. Trades' Dep't v. Donovan, 543 F. Supp. 1282, 1285 (D.D.C. 1982).

Yet equality of institutional competence alone does not explain why Congress did not delegate the matter to an agency. This statutory barrier reflects a political and social judgment which was important to significant segments of the public and to Congress, and the statutory barrier is the best means of assuring that the judgment is preserved. The barrier prevents shifts in executive branch policy as administrations come and go. It guarantees that if a shift in policy is to take place, it must occur in Congress.

Davis-Bacon would be considered by economists as a legal constraint limiting alternatives subject to cost/benefit analysis. It seems equally clear that the Act was similarly viewed and designed by Congress. It is another of those cases which goes beyond mere specificity. The balance between costs and benefits was struck by Congress and subsequently recognized and generally supported by the judiciary. One can readily predict how Department of Labor officials would respond if asked whether their recent efforts to give greater weight to the costs of prevailing wage rates have encountered a statutory barrier to cost/benefit analysis. It is obvious that they have.

G. *Transport of Explosive Materials*

Chapter 7 of Title 46 of the Code concerns carriage of explosives or dangerous substances on vessels. Included are provisions which represent a statutory bar to carriage of certain materials without opportunity for the exercise of agency discretion to relax or relieve the prohibition:

> (3) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel fulminates or other detonating compounds in bulk in dry condition, or explosive compositions that ignite spontaneously or undergo marked decomposition when subjected for forty-eight consecutive hours to a temperature of one hundred and sixty-seven degrees Fahrenheit, or compositions containing an ammonium salt and a chlorate, or other like explosives.
>
> (4) It shall be unlawful knowingly to transport, carry, convey, store, stow or use on board any passenger-carrying vessel any high explosives such as, and including, liquid nitroglycerin, dynamite, trinitrotoluene, picrates, detonating fuses, fireworks that can be exploded enmasse, or other explosives sus-

> ceptible to detonation by a blasting cap or detonating fuse, except ship's signal and emergency equipment, and samples of such explosives (but not including liquid nitroglycerin) for laboratory or sales purposes in restricted quantities as may be permitted by regulations of the Commandant of the Coast Guard established hereunder.[228]

These two provisions afford virtually no opportunity for the application of principles of cost/benefit analysis.[229]

These provisions on the transport of certain dangerous materials on vessels are not of recent origin. They are modern vestiges of a statutory scheme originally enacted on February 28, 1871 which concerned transportation of hay, loose cotton, loose hemp, camphene, nitroglycerin or other explosive articles on steamers carrying passengers. The original statute also provided specific guidance on the transport of certain of these materials which were not absolutely prohibited. For example, the statute indicated that cotton or hemp which was transported on such vessels must be compactly pressed and thoroughly covered with bagging of similar material.[230]

In 1940 the statute was revised in substantial measure to account for technological advances; the sections quoted above were enacted in essentially their present form.[231] What is significant, however, is that throughout the history of these statutory provisions there has been little in the way of conferred administrative discretion. Indeed, the most significant change was in the transfer of responsibility for inspection and enforcement from the Secretary of Commerce to the Coast Guard.[232]

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[228] 46 U.S.C. § 170(3), (4) (1982). See also § 170(7)(e), which concerns permits for loading or discharging explosives. This provision requires that such permits not be granted unless state or local requirements are equalled or exceeded. It represents another limitation on the ability of the Coast Guard to engage in cost/benefit analysis and the congressional response to an explosion which occurred in South Amboy, New Jersey. *Cf.* Pennsylvania R.R. Co. v. United States, 124 F. Supp. 52 (D.C.N.J. 1954).

[229] 46 U.S.C. § 170(11) (1982) allows the Commandant of the Coast Guard to exempt any vessel from provisions of section 170 upon finding, normally after public hearings, that "the vessel, route, area of operations, conditions of the voyage or other circumstances" make a statutory requirement unnecessary "for the purposes of safety." This would not, however, seem to lift the strictures against cost/benefit analysis. Rather, it permits waiver of the prohibitions of the statute when its purposes are inapplicable. *Cf.* Geotechnical Corp. v. Pure Oil Co., 196 F.2d 199 (5th Cir. 1952).

[230] Act of February 28, 1871 § 4, ch. 100, 16 Stat. 441 (1871). The 1871 statute also prohibited the transport of gunpowder on passenger-carrying vessels except under special license.

[231] Act of October 9, 1940, ch. 777, 54 Stat. 1023 (1940).

[232] In 1946 the Commandant of the Coast Guard replaced the Secretary of Commerce in these matters pertaining to "issuance of certificates of inspection, and of permits indicating the approval of vessels for operations which may be hazardous to persons or property . . . ." 1946 Reorg. Plan No. 3, § 104, 60 Stat. 730 (1946). What the 1946 Reorgani-

The obvious congressional purpose in enacting these provisions was to protect the public welfare and safety. It might have delegated this responsibility to an agency in broad terms. It did not, and in the process created a statutory barrier to the application of principles of cost/benefit analysis on the part of its administrative delegate. Congress itself responded to obvious hazards, and made its own determination of the relative weight to be given the costs and benefits of the transport of certain hazardous materials on vessels.

There are a number of possible explanations for why Congress elected to proceed in this fashion. First, it is unlikely that there would be extensive debate on the need for limitations and even prohibitions on the transport of explosives and hazardous materials on vessels, especially on passenger-carrying vessels. Consequently, there would be less reason to avoid potentially divisive and disruptive legislative debate by delegating the entire problem to an agency for it to resolve.

Second, the matters before Congress were within its relative competence. It could legislate on these matters with a high degree of specificity without sensing the need for continuing administrative expertise and guidance. It is nevertheless noteworthy that Congress did find it necessary to delve into technical matters when it addressed the time and temperature for decomposition of certain explosives and the specific chemical components of others. Yet in the spectrum of technical complexity these matters are not of the nature of those concerning, for example, the safety of nuclear power plants. Here the nature of the cost/benefit issues was such that there was little need for the accumulated and continuing expertise of an agency to determine whether certain materials should be carried on vessels. It was clear to Congress that an agency should not be involved in the determination. Thus, the primary functions of the agency in this instance were in the areas of inspection and enforcement.[233]

Finally, it may be that Congress recognized that delegation of any opportunity for an agency to engage in cost/benefit analysis on

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zation Plan did was to make permanent what the President had done by Executive Order early in World War II. Harry S. Truman, Letter to Congress *re* Reorg. Plan of 1946, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. CODE CONG. SERV. 1673. The permanent assignment of the responsibility to the Coast Guard recognized that the functions involved were related to the regular activities and general purposes of the Coast Guard and that it had been successful in discharging these responsibilities during the war.

[233] *See* 46 U.S.C. § 170(7)(a) (1982).

these issues would carry a higher degree of political risk. In the setting of a major disaster it might prove difficult to convince the public that Congress had no choice but to let an agency deal with the issue. Constituents might be prone to ask why Congress even gave an agency the chance to err when Congress itself was capable of addressing the issues and barring the transport of dangerous materials. The statutory barrier eliminates this political risk.

In this context it would seem that these particular statutory barriers are not particularly harmful. Congress undertook the task of cost/benefit analysis in an area where it could reasonably be expected to deal intelligently and effectively with the technical issues and delegated only those tasks which it could not be expected to perform, namely inspections and enforcement. As noted, it may even be the preferable route from a political perspective. Thus, the statutory barrier in this case could be considered useful and desirable.

One flaw in this assessment is the assumption that Congress does have the expertise to legislate in definitive fashion on these matters. Certainly the fact that Congress had to amend the statute in major respects in 1940 suggests that technological developments may require statutory revisions. Naturally an agency could provide continuing supervision without the risk of having attention diverted to other matters. Congress, on the other hand, may not be able to devote attention to changing a statutory provision on a "temperature of one hundred and sixty-seven degrees Fahrenheit" even when present information indicates that it should. Congress typically will have other matters with which it must deal. This suggests an inevitable and perhaps undesirable effect of a statutory barrier; science and technology are "frozen" by the terms of the statute.

IV. STATUTORY BARRIERS—THE RELATIONSHIP TO BROADER THEMES IN ADMINISTRATIVE LAW

In the preceding two parts of this study the focus has been upon the varieties of statutory inhibitions to the application of principles of cost/benefit analysis, with the part just concluded considering specific case studies involving statutory barrier and the question of the need for their retention or change. Perhaps the statutory barrier is simply one more of life's opportunities for selective hostility or enthusiasm. If so, it should be recognized and accepted as such. Yet either hostility or enthusiasm may be tempered when the immediate object of attention is placed in broader perspective.

With this in mind, the objective in the following sections is to relate the phenomenon of the statutory barrier to broader themes in administrative law. It is hoped that this analysis will aid in assessing the utility and desirability of statutory barriers to the application of principles of cost/benefit analysis.

A. *The Delegation Doctrine—Strains in Administrative Law Espousing Revival of the Doctrine and Alternative Means of Achieving Its Objectives*

In the past it has been a common tenet of administrative law that a legislative body is not entitled to delegate its power to another, including an administrative agency. It is equally well established that in the normal conduct of governmental affairs legislative bodies frequently delegate sweeping authority to administrative agencies, and at least at the federal level, the courts rarely have struck down such grants of authority on the ground of impermissible delegation.

Constitutional principles provide the basis for this doctrine. Under the Constitution all federal legislative authority lies in the Congress of the United States.[234] Logic, thus, leads to the conclusion that no others may exercise this power and remain within constitutional bounds, even with the consent of Congress manifested in an express delegation of that authority. Shortly before the turn of the century Justice Harlan stated the basic principle in *Field v. Clark*:[235] "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[236]

The judiciary, however, furnished the pragmatism necessary to mitigate the implications of this prohibition. Even as the Court reiterated the principle in *Field,* it found a delegation of authority to the President in connection with the imposition of tariffs constitutional. The Court observed that "[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of Congress. It was not the making of law."[237] This result has been typical. Congress spins off some of its authority to persons in government outside the legislative branch, the Supreme Court upholds the delegation, and it does so without directly rejecting the basic prohibition and often offering it at least lip service.[238] The pragmatism conducive to such results is revealed in another of the earlier cases in which the Court observed that "[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission . . . to fix those rates . . . ."[239]

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[234] U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in the Congress of the United States."

[235] 143 U.S. 649 (1892).

[236] *Id.* at 692.

Indeed, only twice has the United States Supreme Court declared delegations of authority to government officials unconstitutional on the ground of impermissible delegation. In 1935 in *Panama Refining Co. v. Ryan*[240] it struck down the President's delegated authority to ban shipments of "hot oil" under the National Industrial Recovery Act. In the same year it took similar action in *Schechter Poultry Corp. v. United States*[241] with respect to the President's authority under the same act to approve codes of fair competition. However, after *Panama* and *Schechter* the Court returned to its prior practice of upholding the constitutionality of congressional delegations of authority to federal administrative officials.[242] The result has been the continued vitality of the abstract constitutional principle prohibiting delegation and the irrelevance of that principle as an effective means of constraining delegations of legislative authority. This, however, has not been enthusiastically embraced in all quarters as an acceptable or desirable accommodation of constitutional principle and practical reality.

The Supreme Court's traditional inclination to give little practical effect and meaning to the delegation doctrine has not escaped criticism. Both within and without the Court there have been those who have advocated that the doctrine be revived.

Various Justices have been troubled from time to time by the Court's failure to apply the doctrine more rigorously in controlling delegations of authority to administrative agencies. For example, in *Arizona v. California*[243] Justices Douglas and Stewart joined Justice Harlan in partial dissent. The case concerned the legitimacy of a delegation of authority to the Secretary of the Interior under the Boulder Canyon Project Act of 1928. Justice Harlan wrote that "[t]he unrestrained power to determine the burden of [water] shortages is the power to make a political decision of the highest order"[244] and, thus, "[t]he delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts."[245]

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[237] *Id.* at 693.

[238] *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944) (price controls); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (tariffs); Buttfield v. Stranahan, 192 U.S. 470 (1904) (tea standards).

[239] *Hampton & Co.*, 276 U.S. at 407-08.

[240] 293 U.S. 388 (1935).

[241] 295 U.S. 495 (1935).

[242] *See, e.g*, Lichter v. United States, 334 U.S. 742 (1948) (renegotiation of war contracts); Fahey v. Mallonee, 332 U.S. 245 (1947) (conservators for distressed financial institutions); Yakus v. United States, 321 U.S. 414 (1944) (price controls).

More recently Justice Rehnquist in particular has been the Court's principal advocate of resurrection of the delegation doctrine. *Industrial Union Department v. American Petroleum Institute* concerned the Occupational Safety and Health Administration's standard limiting occupational exposure to benzene.[246] The Court affirmed the judgment of the court of appeals holding the standard invalid. Justice Rehnquist agreed with this result, but for different reasons. In a concurring opinion he indicated that Congress, in delegating its authority to the Secretary of Labor, had failed to give any precise or even discernible indication of whether the Secretary was to weigh costs and benefits in promulgating standards. Thus, he concluded "that Congress, the governmental body best suited and most obligated to make the choice confronting us in this case, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."[247] He urged that "[w]e ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority"[248] and "[i]f we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it."[249]

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[243] 373 U.S. 546 (1963). *See also* United States v. Robel, 389 U.S. 258, 272-82 (1967) (Brennan, J., concurring) (Justice Brennan concurred in the decision striking down a portion of the Subversive Activities Control Act, Pub. L. No. 81-831, 64 Stat. 937 (1950), but preferred the delegation doctrine rather than the First Amendment as the basis for the unconstitutionality of the statute); Zemel v. Rusk, 381 U.S. 1, 20-23 (1965) (Black, J., dissenting) (Justice Black dissented from a decision upholding the authority of the Secretary of State to impose area restrictions on the right to travel. Unconstitutional delegation of legislative authority was the basis for his dissent.).

[244] Arizona v. California, 373 U.S. 546, 626 (1963).

[245] *Id.*

[246] 448 U.S. 607 (1980). See generally SCHWARTZ, ADMINISTRATIVE LAW 51-52 (2d ed. 1984), for a discussion of Justice Rehnquist's views on revival of the delegation doctrine.

[247] 448 U.S. at 672 (Rehnquist, J., concurring).

[248] *Id.* at 686 (Rehnquist, J., concurring).

A year later another OSHA standard concerning cotton dust in the workplace was before the Court. Again Justice Rehnquist was unsuccessful in convincing a majority of the unconstitutionality of the delegation of standard setting authority to the Secretary, although the Chief Justice did join him in dissent. He wrote: "Congress simply left the crucial policy choices in the hands of the Secretary of Labor" and "in so doing . . . unconstitutionally delegated its legislative responsibility to the Executive Branch."[250]

Justice Rehnquist's desire to revive and invoke the doctrine was founded on his view of the salutary purposes of the doctrine. First, it assures "that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[251] Next, it makes it more likely that when Congress finds it necessary to delegate authority, its delegation will be accompanied by standards to guide the delegatee in its exercise.[252] And finally, the presence of accompanying standards will permit the judiciary to determine whether an agency has strayed beyond the confines of its delegated authority.[253]

Justice Rehnquist's position is not without support form outside the Court. Others have urged that the delegation doctrine be given more than its present status as historical curiosity.[254] Judge Skelly Wright is one prominent example. In reviewing Kenneth Culp Davis' 1969 book, *Discretionary Justice: A Preliminary Inquiry,*[255] Judge Wright questioned the practicality of reliance upon agency rulemaking as a means of defining and controlling discretionary administrative action.[256] Such discretion is typically the product of broad and uncontrolled delegations of authority to administrative agencies, and one of the means Judge Wright offers for controlling that discretion is the delegation doctrine:

> Yet at the risk of seeming antiquarian, I think the reported demise of the

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[249] *Id.* at 687 (Rehnquist, J., concurring).

[250] American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 548 (1981) (Rehnquist, J., dissenting). See generally *supra* Part III.A for a discussion of other implications of these cases.

[251] *Industrial Union,* 448 U.S. at 685 (Rehnquist, J., concurring).

[252] *Id.* at 685-86 (Rehnquist, J., concurring).

[253] *Id.* at 686 (Rehnquist, J., concurring).

[254] *Id.* at 687 n.6 (Rehnquist, J., concurring).

[255] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). See *infra* text accompanying notes 270-75 for a discussion of Professor Davis' alternatives to the delegation doctrine for control of agency discretion.

[256] Wright, *Beyond Discretionary Justice,* 81 YALE L.J. 575, 580 (1972).

> delegation doctrine is a bit premature. To be sure, we can all join in rejecting broad formulations of the doctrine . . . . But one can reject . . . extreme position[s] without conceding that Congress should be permitted, in effect, to vote itself out of business. There must be some limit on the extent to which Congress can transfer its own powers to other bodies without guidance as to how these powers should be exercised.[257]

Thus, he concludes that "the delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies"[258] and expresses his hope "that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies."[259]

John Hart Ely is another who finds no comfort in the widespread acceptance of broad delegations of authority. In *Democracy and Distrust, A Theory of Judicial Review* he explains this in part as a matter of political convenience. "[I]t is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[260] The result is that the administrators perform the tasks of the legislators, and this Ely concludes "is wrong, not because it isn't 'the way it was meant to be'—in some circumstances there may be little objection to institutions' trading jobs—but rather because it is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."[261] Revival of the delegation doctrine with judicial insistence on meaningful policy guidance from legislators is one means Ely offers to correct the problem.

James O. Freedman also sees reason for revival of the delegation doctrine. Indeed, in some measure he sees evidence of an inclination on the part of the Supreme Court to do so.[262] If this is to occur, he urges, however, that the Court "must go beyond merely reiterating the doctrine's traditional teaching that Congress must state meaningful statutory standards for the exercise of delegated legislative power."[263] In his judgment more is required: "The new lines of the doctrine ought to be drawn to reflect the normative premise that Congress, in the act of delegating legislative power, may not abdicate its constitutional responsibility for making the nation's basic decisions of policy."[264]

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[257] *Id.* at 582.

[258] *Id.* at 583.

[259] *Id.* at 584.

[260] J. Ely, Democracy and Distrust, A Theory of Judicial Review 131 (1980).

[261] *Id.* at 132.

[262] J. Freedman, Crisis and Legitimacy, The Administrative Process and American Government 80-88, 93 (1978).

[263] *Id.* at 93.

These calls to revive the delegation doctrine[265] need not be viewed merely as nostalgia for a past which was rejected with clearly compelling good reason. Rather they would place a higher value and greater faith in democratic processes in lieu of exercises of expert discretion in relative political insulation. As Judge Wright observed: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy."[266]

That the idea of reviving the delegation doctrine appears to be gaining adherents within and without the judiciary does not alter the reality that broad delegations remain entrenched and generally accepted and even valued.[267] As recently noted by three advocates of revival:

> [T]he occasional plea for resuscitation of the nondelegation doctrine has not prompted a response from the Supreme Court or the lower courts. Still, the *idea* of a change in constitutional rules governing legislative delegations has acquired a fresh dignity. It should inspire a serious dialogue if not imminent action.[268]

One reason for this seems to be the view that there are effective and desirable alternative means of achieving the objectives of the doctrine.[269]

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[264] *Id.*

[265] *See also* T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 129-46, 197-99 (1969); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-67 (1982); Koslow, *Standardless Administrative Adjudication*, 22 AD. L. REV. 407 (1970); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).

[266] Wright, *supra* note 256, at 585.

[267] The judicial record amply demonstrates that the dominant position is supportive of broad delegation of power to administrative agencies. There is considerable support and even enthusiasm for the status quo. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737 (D.D.C. 1971); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1693-97 (1975).

[268] Aranson, Gellhorn & Robinson, *supra* note 265, at 67 (emphasis in original).

[269] Whether revival of the doctrine would produce the anticipated result of more refined legislation and less administrative discretion is a distinct and important practical question. *See* Bunn, Irwin & Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341. This study sought to assess whether stricter adherence to the nondelegation doctrine influences the nature of legislation. Judicial decisions and statutes in Wiscon-

Perhaps the leading proponent of alternatives to the delegation doctrine has been Kenneth Culp Davis. His views on the subject are developed principally in his book, *Discretionary Justice: A Preliminary Inquiry,*[270] and in an article, *A New Approach to Delegation.*[271]

Davis would not resurrect the doctrine in its traditional form: "The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards."[272] His preference would be modification of the doctrine with an accompanying shift in its emphasis. The concern would not be to force legislative development of standards; nor would the objective be to inhibit delegations of authority.[273] Rather one would look to the agencies themselves for clarification of the standards to guide exercises of broad delegations of authority,[274] and the courts would stress administrative safeguards and standards to protect "against unnecessary and uncontrolled discretionary power . . . ."[275]

This suggested modification and expansion of the purposes of the doctrine clearly separate Davis from those who advocate its revival. Under the Davis approach the resolution of policy choices would not be more democratic. The basic decisions still would not be made by elected decisionmakers, although they would be made and with much greater clarity and specificity than at present. Yet this approach would not satisfy the concerns of the proponents that the decisions should be made by what they see as the constitutionally appropriate institution of government, the Congress.

Others have given less emphasis to the administrative development of standards to confine and structure delegated discretion and more to insistence on adequate administrative procedures to

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sin and Illinois were the focal point of the study; these two states represent the poles of judicial application of the doctrine. The authors concluded that "a strict nondelegation doctrine does not appear to prevail over the other differences between legislatures that affect the breadth of delegated discretion" and, consequently, "it is doubtful that the doctrine's revival by state or federal courts would be worth the resulting added uncertainty of statutory validity." *Id.* at 378. Under these circumstances alternative means of achieving the objectives of the doctrine would appear to have the advantage of practicality as well as whatever substantive merit that they carry.

[270] DAVIS, *supra* note 255, at 27-51.

[271] Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

[272] *Id.*

[273] DAVIS, *supra* note 255, at 50.

[274] *Id.*

[275] Davis, *supra* note 271, at 75.

protect against arbitrary and capricious action.[276] These individuals also accept Professor Davis' proposition that broad and even standardless delegations are the likely norm, and they move from this perception of the realities to focus on procedural safeguards as an alternative to revival. They, too, are subject to the criticism that the appropriate governmental institution still would not be making the fundamental policy choices.

Professor Richard B. Stewart offers yet another alternate to revival of the doctrine. He considers that the latter course would "clearly be unwise" because "[d]etailed legislative specification of policies under contemporary conditions would be neither feasible nor desirable in many cases, and the judges are ill-equipped to distinguish contrary cases."[277] For similar reasons he questions the Davis solution.[278] He does propose one possible alternative which he characterizes as the "interest representation" model. Under this approach one accepts that the administrative process should mirror the political process and then focuses on means by which affected interests would be afforded opportunities to participate in the process.[279]

The "interest representation" model, however, is not presented as a solution to the matter of delegation and its attendant problems; rather it provides an alternative way of thinking about the problem without any assurance of "simplistic remedies."[280] In this respect the model does present an alternative to the delegation doctrine, but it is one which is of less determinate and arguably more realistic nature. Furthermore, it, too, would not satisfy the desire that Congress alone make the basic policy choices.

B. *Statutory Barriers—Specificity of Congressional Delegation as an Alternative to the Delegation Doctrine*

The preceding discussion of the delegation doctrine, calls for its revival, and proposals for alternative means for achieving its objectives provide a framework for assessment of the utility and desirability of statutory barriers to the application of principles of cost/benefit analysis.

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[276] *See* SCHWARTZ, *supra* note 246, at 59-60. This trend also derives in substantial measure from Professor Davis, although the courts adopting the approach place primary emphasis on assuring adequate procedures.

[277] Stewart, *supra* note 267, at 1695.

[278] *Id.* at 1698-1702.

[279] *Id.* at 1711-70.

[280] *Id.* at 1789-90, 1813.

The principal characteristic of the statutory barrier is its specificity. In the case of a true statutory barrier this specificity is complemented by a clear expression of legislative intent that cost/benefit analysis be precluded. In the case of a partial barrier it is specificity alone which confines, in some measure, the range of cost/benefit analysis. In the former,administrative discretion is confined to the point that it does not really exist. Indeed, the only latitude for administrative discretion with respect to a true statutory barrier is in the area of prosecutorial discretion and selective enforcement; a statutory barrier may prescribe what an agency must do if it acts, but the barrier alone will not compel action if an agency declines to act at all. Yet for present purposes and within the terms of a barrier itself, the hallmark is the absence of administrative discretion. Naturally there is a greater range for discretion and thus cost/benefit analysis in the case of a merely partial barrier.

For those, and particularly those in the judiciary, who developed the modern version of the delegation doctrine the statutory barrier can only mitigate any discomfort they may have in sustaining broad and undefined delegations of authority to administrative agencies. By its nature the statutory barrier eliminates the necessity for the doctrine and the tension which otherwise exists with the traditional prohibition of delegation. The specificity of the barrier in this sense substitutes for the doctrine. On the other hand, the barrier does represent an exception to the underlying assumption that broad delegations are necessary to modern government and therefore must be accommodated.

Similarly, those who advocate revival of the doctrine will have no difficulty with the statutory barrier which precludes cost/benefit analysis, in whole or in part. The barrier represents greater congressional precision in its delegation of authority to an agency, and the barrier accomplishes precisely what these persons seek through revival—democratic resolution of basic policy issues by elected representatives in Congress. In such cases there is the added virtue of voluntary congressional action without need for judicial prodding in the form of a resurrected delegation doctrine.

If the advocates of revival are dissatisfied with a particular statutory barrier, it is not likely to be the barrier itself which causes concern. Rather, the concern is the likely product of disagreement with the way in which the barrier was designed by Congress and in which the issues of costs versus benefits were resolved. For these persons in these instances the implication is that the statutory barrier need not be eliminated, but merely that it be redesigned by Congress to strike a new balance between costs and benefits. The alternative would be to eliminate the barrier and transfer the discretion for cost/benefit analysis to an administrative body, and this would be unacceptable to the advocates of revival.

Statutory barriers to cost/benefit analysis are much less clearly a satisfactory alternative for those who espouse alternatives to the doctrine. These persons seems more inclined to accept the inevitability and even desirability of broad delegations, including the power to weigh costs and benefits in the balance. Consequently they stress the need for control of discretion once granted.

Thus, a statutory barrier to cost/benefit analysis avoids the problem which the delegation doctrine was developed to address; there is no broad delegation to be explained or justified. Similarly, a statutory barrier eliminates the need to revive classic principles precluding delegation; thus, there is no cause to explore alternatives to the doctrine or its revival.

C. *Statutory Barriers and Administrative Discretion*

The discussion in the preceding section provides a framework which should aid in assessing one's attitude toward statutory barriers to cost/benefit analysis. If a degree of logical consistency is a worthy objective, one should make certain to measure his position on the question of delegation against that on statutory barriers. There is an intellectual dilemma in opposing statutory barriers to cost/benefit analysis and supporting resurrection of the delegation doctrine in one form or another. As an alternative one can simply accept that the desirability of statutory barriers versus breadth of administrative discretion will fluctuate depending on the acceptability of the individuals who have the opportunity to design the barriers or exercise administrative discretion. Under this approach one favors statutory barriers if one has working control of Congress; one opposes them if one has working control of the agencies. If one controls both, the matter becomes academic, and if one controls neither it becomes traumatic.

The choice is, nonetheless, between a logically consistent resolution of the inherent tension between statutory barriers and administrative discretion, or a pragmatic recognition that "it all depends." The purpose of this study is not to recommend one course or the other, but only to suggest that there is merit in recognizing the implications of the choice eventually made.

Some further development of this point may be helpful. It appears that some of the current interest in statutory barriers to cost/benefit analysis is attributable to the suspicion that there are large numbers of these creatures abroad and that they tend to frustrate enlightened administrative decision making and impede progress. As this study concludes, the suspicion concerning their numbers is not justified by the facts. Indeed, it may be that the suspicion of the number of barriers may be based on agency assertions that an agency would be delighted to engage in cost/benefit analysis if it were not barred from doing so by statute. A more probable explanation of such assertions is agency intransigence, an unwillingness to engage in cost/benefit analysis. Another consideration which may contribute to the suspicion is the high visibility of statutory barriers such as the Delaney Clause. That visibility may suggest to some that the phenomenon is epidemic, although the reality is that expansive administrative discretion is the norm.

It is at this juncture that devotees of cost/benefit analysis should proceed with some caution and pause to reflect if they are inclined to avoid logical inconsistency. As noted, it is difficult to oppose statutory barriers, embrace cost/benefit analysis at the agency level and espouse revival of the delegation doctrine at the same time. Of course, many persons would not attempt to subscribe to each of these three possibilities, but the author will venture his own suspicion that many persons presently concerned with the existence of statutory barriers to cost/benefit analysis might be equally uncomfortable with broad delegations of authority to administrative agencies. For such persons, if in fact they exist, the following analysis may be useful even if not consoling.

In those instances where a statute does inhibit cost/benefit analysis, it does not necessarily follow that cost/benefit analysis has been ignored. Rather, the statute itself will reflect resolution by Congress of the tension between costs and benefits in the course of enacting the statute. In this respect a barrier is not necessarily undesirable. As we have seen in a variety of settings, to the extent that the statute precludes cost/benefit analysis, it withholds discretion from an agency. The effect is greater congressional precision in the scope of its delegation of authority to the agency.

If one advocates precision in congressional delegation on the ground that elected institutions of government rather than unelected administrative bodies should make fundamental policy decisions, there is reason to be pleased with the statutory barrier. For such persons the dilemma, if any, is not the existence of the barrier, but rather the manner in which it was designed by Congress and the way in which Congress resolved issues of costs versus benefits. Under these circumstances the statutory barrier need not be removed, but simply redesigned with a new balance struck between costs and benefits. The alternative is to eliminate the barrier and transfer the discretion for cost/benefit analysis to an administrative body. If one accepts the latter alternative, it must be recognized and accepted that this requires recognition and acceptance of broad grants of discretion to administrative officials who sometimes are lambasted as nameless and faceless and even headless. If this is not a palatable course, the matter comes full circle and the alternative is congressional resolution of the fundamental and competing policy interests. This is precisely what a statutory barrier to cost/benefit analysis represents.

V. *Conclusion*

A primary objective of the case studies[281] was to determine what, if any, general conclusions might be reached concerning the utility and desirability of statutory barriers to cost/benefit analysis. The ultimate objective of this study was to determine whether statutory barriers to the application of principles of cost/benefit analysis are useful and desirable.

Implicit in this statement of ultimate objective is the suggestion that they are not. Barriers inhibit and impede; principles are to be valued especially when they afford an opportunity to weigh pros and cons. The absence of a statutory barrier, thus, affords freedom from arbitrariness and freedom for reasoned decision making. In this light the statutory barrier deserves abolition; it is neither useful nor desirable. The reality of statutory barriers, however, does not support this breadth of generalization. Others might discern patterns or common themes which escape the author, but the case studies suggest that generalization is difficult if not impossible in either support or opposition to the statutory barrier.

Actually there may be little need to generalize concerning statutory barriers. First, it should be recalled that true statutory barriers, those where Congress clearly manifests an intention to bar cost/benefit analysis, are not widespread at the federal level. If they were, perhaps one would be compelled to address their utility and desirability in general terms. Their number alone would then be a factor requiring consideration. Yet since the true statutory barrier, as opposed to the partial barrier, is rather rare and the impact of sheer numbers is not pertinent, evaluation of their merits on an individual basis is not only feasible, but also preferable. Whatever the perils of generalization, there is less need to face them in this instance.[282]

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[281] *See generally supra* Part III.

An examination of specific statutory barriers gives further reason to assess their desirability on an individual basis. One reason for this is the diversity of substantive areas in which the statutory barrier has been employed, notwithstanding their relative scarcity. The nature of a statutory barrier makes this even more pronounced. The specificity of the statutory barrier tends to make each unique and intimately tied to the substantive issues at hand. It is quite different in situations involving broad delegations of authority which, for example, charge agencies with the task of regulating "in the public interest, convenience and necessity."

Notwithstanding these substantial caveats, some modest generalizations do seem justified. They do not, however, support unqualified acceptance or rejection of statutory barriers.

This study began with a search for an acceptable definition of cost/benefit analysis; it ends with the even more illusive search for a definition of what constitutes a statutory barrier. The test employed was whether the cost/benefit analysis mandate of Executive Order 12291 would be precluded by virtue of statutory prescription.

As indicated in the case studies, there are few true or absolute statutory barriers to cost/benefit analysis. Most are only partial in nature in that they withdraw from consideration some, but not all alternative policy choices which are potential objects for analysis. And it seems that the best evidence of an absolute barrier is a strong indication that Congress itself has undertaken the task of weighing costs and benefits, done so in comprehensive fashion and made clear on the face of the statute or otherwise that its administrative delegate is not to restrike the balance.

The result is a spectrum ranging from total to partial to no barrier at all. Where a particular statute falls on this spectrum is a function of legislative intent and the specificity of the statute. Specificity in this context means the extent to which the statute precludes consideration of alternatives which the analyst otherwise would consider.

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[282] Broad delegations of authority and discretion to administrative agencies, in contrast, provide an example of a statutory phenomenon which is susceptible to and even requires generalization. The frequency with which Congress grants such authority in itself demands an assessment of its desirability and utility.

If one assumes, as many do, that cost/benefit analysis is a useful and effective adjunct to effective decision making, the true statutory barrier has a probable and important advantage over the partial barrier. In the case of a total barrier it is likely that conscious cost/benefit analysis of a sort has been employed by Congress. When Congress expressly prohibits the process at the administrative level it presumably has conducted its own weighing of costs and benefits. Certainly that is what it did in the case of the Delaney Clause.

The case studies suggest, however, that the rigor of congressional cost/benefit analysis would not always measure up to the rigor required under Executive Order 12291. This suggests further that when Congress does impose a barrier to agency cost/benefit analysis and also feels that it is germane and useful to analyzing the matter under consideration, it should voluntarily impose on itself a rigorous brand of cost/benefit analysis in designing the statute.

The partial barrier is another matter. To the extent it eliminates alternatives from consideration under cost/benefit analysis it is improbable that Congress itself has engaged in such analysis in eliminating the alternative. Even if it has, it is unlikely it will have been rigorous. Partial barriers seldom seem to be the product of intentional cost/benefit analysis. What Congress might do is pay greater attention to the partial barrier and, if inclined, insure that cost/benefit analysis is conducted at its level when it precludes such analysis of one or more but not all alternative policy choices at the agency level.

If one accepts, as suggested, that the merits of individual statutory barriers depend primarily on the specifics of the factual environment in which they arise and are applied, further analysis may be helpful in determining their desirability. If the issues are relatively simple and within the competence of Congress, the barrier may be desirable and certainly not harmful. However, its overall desirability must depend on some other factor. Rarely will a matter be within the competence of Congress and beyond the competence of an agency created by Congress.

If the issues are complex, technical and in a constant state of change, the need for agency expertise and continuing supervision suggests that a statutory barrier is undesirable. If a matter is realistically beyond the competence of Congress, any barrier created by it can only prove counterproductive. For example, if a matter can be addressed only with an appreciation of complex scientific and technical issues, an expert agency may be the only effective institution for weighing costs versus benefits. This problem is aggravated if the area is one in which scientific knowledge and technology are changing at a rapid pace. In such cases a statutory barrier created by Congress at best may reflect an adequate assessment at the time of enactment, but it may become outdated and an unreasonable burden not long thereafter.

The politics of statutory barriers offers similarly mixed conclusions. If there is substantial concern that agencies will be subject to external pressure which they will not be able to withstand, the statutory barrier will protect the agency from itself. It also may assure that the balance struck between costs and benefits in the mind of Congress is not undermined by a reluctant agency, and this may spare Congress the ire of constituents who support the decision reflected in the barrier. Yet statutory barriers are visible in ways in which agency exercises of discretion may not be; thus, agencies sometimes may be better able to resist or disperse external pressures than Congress. In the latter case a statutory barrier would be less desirable than a barrier created by an agency. And in another case that same visibility of the statutory barrier may be politically useful because Congress will be in a better position to take credit for a danger thwarted or benefit conferred.

Furthermore and beyond political considerations, statutory barriers are useful as a means of controlling administrative action. Yet they are undesirable if administrative discretion is required to deal with a matter effectively and intelligently.

It is apparent that even these most modest generalizations concerning the desirability and utility of statutory barriers to the application of principles of cost/benefit analysis tend themselves to prove the initial point—that the question is best answered in the context of individual barriers. This list of variations on the pros and cons of statutory barriers could go on, but for present purposes it should be sufficient to illustrate the point that whether or not they are useful and desirable depends on the circumstances.

There does, however, appear to be one basis for generalizing about statutory barriers which is a function of matters independent of the specifics of any individual barrier. If one has a working majority in Congress and no effective control over administrative agencies, statutory barriers may be perceived as worthwhile. If one is on the other side in this distribution of power, then one's assessment of statutory barriers will vary accordingly. And if one has working control in both Congress and the agencies, there would be less reason to care.

The obvious advantage of this approach in evaluating the merits of statutory barriers is that it produces a consistent and comprehensive position on the subject. The disadvantages are equally obvious. It draws upon a simplistic view of political control in Congress and in the agencies, and even if one accepts its basic premises, the fluidity of political relationships and power guarantees that before long it will be necessary to change one's position on statutory barriers. Thus, as the case studies indicate, the merits of statutory barriers can best be addressed on a case-by-case basis.

BACKGROUND REPORT FOR RECOMMENDATION 85-2

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THE ROLE OF REGULATORY ANALYSIS IN REGULATORY DECISIONMAKING *

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*** Chapter Three is not published herein. It is available for inspection at the Administrative Conference of the United States.**

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THE ROLE OF REGULATORY ANALYSIS IN REGULATORY DECISIONMAKING

Table of Contents

Chapter One: Introduction

I. Regulatory Analysis and Regulatory Reform
II. Regulatory Reform as Regulatory Relief
III. Public Accountability and Regulatory Reform
IV. Rational Decisionmaking and the Two Rulemaking Cultures

  A. Techno-Bureaucratic Thinking
  B. Comprehensive Analytical Thinking
  C. The Clash of Rulemaking Cultures

V. Regulatory Analysis as a Vehicle for Regulatory Reform

Chapter Two: The Evolution of the Regulatory Analysis Program

I. NEPA Antecedents
II. The Quality of Life Review in the Nixon Administration
III. The Inflation Impact Statement Program
IV. The Carter Administration Regulatory Analysis Program
V. The Reagan Administration Regulatory Impact Assessment Program
VI. The Regulatory Flexibility Act

Chapter Three: The Use of Regulatory Analysis in the Decisionmaking Process

I. Introduction
II. The Use of Regulatory Analysis in the Department of Agriculture

  A. Departmental Structure and Hierarchy

    1. The Food Safety and Inspection Service
    2. The Agricultural Marketing Service
    3. The Animal and Plant Health Inspection Service
    4. The Agricultural Stabilization and Conservation Service

  B. The Formal Regulatory Process

    1. Origin and Threshold Analysis

      a. Food Safety and Inspection Service
      b. The Agricultural Marketing Service
      c. The Animal and Plant Health Inspection Service
      d. The Agricultural Stabilization and Conservation Service

        2. The Proposed Rule and the Preliminary Regulatory Analysis Document
            a. The Food Safety and Inspection Service
            b. The Agricultural Marketing Service
            c. The Animal and Plant Health Inspection Service
            d. The Agricultural Stabilization and Conservation Service
        3. Interagency Review of Proposed Rules and Preliminary Regulatory Analysis Documents
        4. Agency Response to Public Comment
        5. Interagency Review of the Final Rule and Final Regulatory Analysis Documents
    C. Level of Analysis in Regulatory Analysis Documents
    D. Impact of Regulatory Analysis on the Decisionmaking Process

III. The Use of Regulatory Analysis in the Department of Transportation

    A. Departmental Structure and Hierarchy
        1. The National Highway Traffic Safety Administration
        2. The Federal Aviation Administration

    B. The Formal Regulatory Process
        1. Origin and Threshold Analysis
            a. The National Highway Traffic Safety Administration
            b. The Federal Aviation Administration
        2. The Proposed Rule and the Preliminary Regulatory Analysis Document
            a. The National Highway Traffic Safety Administration
            b. The Federal Aviation Administration
            c. Departmental Review
        3. Interagency Review of Proposed Rules and Regulatory Analysis Documents
            a. The National Highway Traffic Safety Administration
            b. The Federal Aviation Administration

        4. Agency Response to Public Comment
        5. Interagency Review of the Final Rule and Final Regulatory Analysis Documents
        6. Retrospective Analysis

    C. Level of Analysis in Regulatory Analysis Documents
    D. The Impact of Regulatory Analysis Documents on the Decisionmaking Process

IV. The Role of Regulatory Analysis in the Department of Labor

    A. Departmental Structure and Hierarchy

        1. Departmental Review Structure
        2. The Occupational Safety and Health Review Administration

    B. The Formal Regulatory Process

        1. Origin and Threshold Analysis

            a. Departmental Procedures
            b. The Occupational Safety and Health Administration

        2. The Proposed Rule and Preliminary Regulatory Analysis Document

            a. Departmental Procedures
            b. The Occupational Safety and Health Administration

        3. Interagency Review of Proposed Rules and Preliminary Regulatory Analysis Documents

            a. Departmental Procedures
            b. The Occupational Safety and Health Administration

        4. Agency Response to Public Comment
        5. Interagency Review of the Final Rule and Final Regulatory Analysis Document
        6. Retrospective Analysis

    C. Level of Analysis in Regulatory Analysis Documents
    D. The Impact of Regulatory Analysis on the Decisionmaking Process

- V. The Role of Regulatory Analysis in the Environmental Protection Agency
    - A. Agency Structure and Hierarchy
        - 1. Program Offices
        - 2. The Office of Policy, Planning and Evaluation
    - B. The Formal Regulatory Process
        - 1. Origin and Threshold Analysis
            - a. The Lead Offices
            - b. The Start Action Request
            - c. The Threshold Determination
            - d. The Options Selection/Rejection Designation
        - 2. The Proposed Rule and the Preliminary Regulatory Analysis Documents
            - a. Internal Program Office Deliberation
            - b. The Work Group
            - c. The Development Plan
            - d. The First Options Review Meeting
            - e. The Preliminary Regulatory Analysis Document
            - f. The Second Level I Options Review Meeting
            - g. The Decision Package
            - h. Steering Committee Review
        - 3. Interagency Review
        - 4. Agency Response to Public Comment
        - 5. Retrospective Analysis
    - C. Level of Analysis in Regulatory Analysis Documents
    - D. The Impact of Regulatory Analysis on the Decisionmaking Process

Chapter Four: Regulatory Analysis As A Vehicle for Regulatory Reform

- I. Introduction
- II. Essential Aspects of Regulatory Analysis
- III. The Virtues of Regulatory Analysis
    - A. Bringing Comprehensive Analytical Rationality to Bear on Decisionmaking
        - 1. Options Identification
        - 2. Gathering and Analyzing Information
        - 3. Justification by Explicit Reference to Articulated Policies

        4. Explicit Identification of Information Gaps and Assumptions
        5. Restraint Upon Inappropriate "Political" Considerations
        6. Identification of "Correct" Regulatory Results
        7. Securing Successful Judicial Review

    B. Facilitating Policy Management
    C. Informing Congress and the Public
    D. Providing Regulatory Relief
    E. Conclusion

IV. Impediments to Analysis

    A. Impediments to Preparing Regulatory Analysis

        1. Conflicting Goals
        2. Identifying Options
        3. Inadequate Information
        4. Bias in Cost and Benefit Studies
        5. Inadequate Models
        6. Inadequate Tools for Quantification
        7. Characterizing Uncertainties
        8. Problems of Cost-Benefit Analysis
        9. Hidden Policy Agendas
        10. Reliance on Contractors
        11. Retrospective Analysis
        12. Deadlines and Delay
        13. Insufficient Analytical Resources

    B. Impediments to Communicating Analysis

        1. Intra-agency Policy Management
        2. Communication with Reviewing Institutions and the Public

    C. Impediments to the Use of Analysis

        1. Technical Staff Resistance to Analysis
        2. Resistance of Upper Level Decisionmakers
        3. Statutory Constraints on the Use of Analysis
        4. Use of Analysis to Advance Substantive Goals

V. Conclusion

Chapter Five: Structuring Regulatory Analysis Into the Decisionmaking Process

I. Introduction
II. Roles for the Regulatory Analyst

  A. Information Analyst
  B. Justifier
  C. Policy Communicator
  D. Options Identifier
  E. Institutional Skeptic
  F. Advocate for Efficiency
  G. Influential Determinant of Agency Policy

III. Timing of Regulatory Analysis
IV. Four Models for Structuring Regulatory Analysis into the Agency Decisionmaking Process

  A. The Hierarchical Model
  B. The Outside Advisor Model
  C. The Team Model
  D. The Adversarial Model

V. Selecting the Right Model

  A. A Comparison of the Models
  B. An Intermediate Approach

VI. Conclusion

CHAPTER ONE
INTRODUCTION

I. Regulatory Analysis and Regulatory Reform.

In the late 1960s and early 1970s federal regulatory agencies were criticized for the cumbersome adjudicatory procedures that they used to implement most regulatory actions. Studies suggested that adjudicatory procedures were rendering the agencies ineffectual in performing the tasks that Congress assigned to them.[1] Many agencies responded to this criticism by shifting resources into efforts to promulgate general rules to govern private conduct through informal rulemaking procedures. At the same time Congress enacted a whole new generation of regulatory statutes that imposed new social and environmental responsibilities on entire sectors of the economy. Unlike the older statutes providing for economic regulation, these "social regulation" statutes generally empowered (and often required) federal agencies to promulgate binding rules without engaging in cumbersome adjudicatory procedures. The shift in the older agencies from the adjudicatory mode to the rulemaking mode and the emergence of the new rulemaking agencies combined in the early 1970s to produce a "rulemaking revolution" that had the potential to expand greatly the federal government's regulatory powers.

The "rulemaking revolution" had been under way for less than a decade when regulated industries and numerous commentators from academia began to complain that the agencies were going too far. Operating beyond the range of effective political control, they were irrationally imposing burdensome requirements on regulated entities without taking into account their costs or assessing their corresponding benefits. These criticisms and their corresponding prescriptions for change paraded under the broad banner of "regulatory reform."

Some of the critics simply desired a return to less burdensome times when administrative agencies were perceived to be more sympathetic to the regulated industries. Unconvinced of the social desirability of government intervention into the marketplace, these critics argued that the only effective solution to the regulatory morass was to remove the dead weight of government regulation from the back of American industry. In this view, regulatory reform meant "regulatory relief."[2]

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[1] See generally, Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276 (1972).

[2] See generally, G. Eads & M. Fix, Relief or Reform: Reagan's Regulatory Dilemma ch. 1 (1984).

While the natural focus for these criticisms was the statutes that empowered the agencies to promulgate burdensome rules, attempts to persuade Congress to ease the substantive regulatory burden have proved largely unavailing. Proponents of "regulatory relief" also took their case to the executive branch, arguing that the agencies had interpreted their stautes overly broadly to empower them to promulgate regulations beyond their statutory authority and demanding that the agencies be "reigned in."

Most critics of the new social regulation, however, agreed that regulation in some form was necessary to a properly functioning society. While acknowledging the value of government regulation, these critics argued that bureaucrats made bad decisions because they were not sufficiently accountable to the President, to Congress, and ultimately to the public. These critics offered various prescriptions for the perceived regulatory diseases, including heightened Presidential control of administrative rulemaking, regulatory budgets, legislative vetoes of final rules, and (for some) broadened public participation in the rulemaking process. For them, regulatory reform was equated with "bureaucratic accountability."

Still other critics were concerned more with the thinking process that went into promulgating and implementing regulations. In their view, agency personnel were not sufficiently analytical in thinking about regulation and its impacts on society. If internal agency decisionmaking procedures could be designed to bring rational analysis to bear on regulatory problems, agencies would reach more rational and perhaps less burdensome results. Regulatory reform, in this view, consisted of restructuring agency decisionmaking processes to include rational-thinking policy analysts, preferably with training in economics, to ensure appropriate sensitivity to the economic impact of regulatory efforts.

By the beginning of the 1980s, the regulatory reform movement had achieved a high political profile. Yet it did not contain a unifying theme. To some, "regulatory reform" meant "regulatory relief;" to others, it meant "bureaucratic accountability;" and to still others, it meant "rational analysis." While a thorough implementation of any one of these themes might predictably complement another, they do not easily converge, and they can in practice be at odds with one another. For example, a rational analysis of an existing regulation might indicate that rather than repealing it, the agency should increase its stringency.[3] Yet this rational analysis would run counter to the "regulatory relief" theme, and increasing the stringency of the rule might defy the desires of a White

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[3] Cf., Inside O.M.B., February 1, 1982, at 1.

House bent on reducing the role of the federal government. Conversely, political accountability to Congress or the President might require an agency to implement an irrational regulatory scheme for the purpose of redistributing wealth from consumers to a favored political constituency, thus running counter to both the rational analysis and the regulatory relief themes.

Although students of the regulatory process have offered a whole host of omnibus regulatory reform packages to implement one or more of these themes and although Congress has studied the matter in intimate detail for nearly a decade, Congress has yet to enact comprehensive "regulatory reform" legislation. The executive branch, however, has for the last three administrations attempted to fill the perceived vacuum by promulgating a series of executive orders that apply to all major rulemaking initiatives by "non-independent" federal agencies.

Initially the executive efforts sought merely to implement the "rational decisionmaking" regulatory reform theme through a requirement that agencies prepare a statement with major rules detailing their negative impacts on the regulated industries.[4] Gradually, "bureaucratic accountability" became a goal of the presidential regulatory reform effort as White House offices were empowered to intervene in rulemaking efforts by analyzing the effects of proposed rules and comment on the rules during the public comment period. Finally, the most recent Executive Order attempts to weave all three themes together by imposing extensive regulatory analysis requirements on agencies, vesting the Office of Management and Budget (OMB) with extensive review powers to ensure political accountability, and imposing substantive criteria on agencies (where not prohibited by statute) designed to provide "regulatory relief" for regulated industries.

This Report is a study of the role that regulatory analysis places in bureaucratic decisionmaking. It will examine the implementation of the regulatory analysis requirements of Executive Order 12291 in three executive Departments (the United States Department of Agriculture (USDA), the United States Department of Labor (DOL), and the United States Department of Transportation (DOT)) and one non-independent agency (the Environmental Protection Agency (EPA)). Although the Report will draw upon all three regulatory reform themes in attempting to explain the conduct of one or more rulemaking institutions, it will focus primarily upon the "rational analysis" theme, because that theme most powerfully undergirds the regulatory impact assessment requirement of the Executive Order.

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[4] Some states have also attempted to implement rational decisionmaking through regulatory analysis. See, Croke & Herlevson, Environmental Cost-Benefit Analysis: The Illinois Experience, in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods 17-26 (Schwartzman, Liroff, Croke eds. 1982).

After describing the history of the current regulatory analysis requirements in Chapter 2, Chapter 3 will follow a typical rule through its "life cycle" in each of those regulatory bodies. The Report will describe the role of the "regulatory analysis office" and attempt to assess the effectiveness of the process mandated by the Executive Order in meeting its three sometimes conflicting goals. Chapter 4 of the Report will identify some impediments to analysis that have arisen in the decade-long experience with regulatory analysis and suggest some mechanisms for reducing or eliminating those impediments. In the process of examining impediments to regulatory analysis, the Report will probe the real world limitations on rational analysis of complex regulatory problems and suggest realistic expectations for the potential of regulatory analysis to improve regulatory decisionmaking.

Since the various regulatory entities have adopted a wide variety of procedural mechanisms for promulgating and reviewing the regulatory analysis documents that the Executive Order requires, it should not be surprising to discover that some decisionmaking models have proved more effective in implementing one or more of the goals than others. Chapter 5 of the Report will examine the four decisionmaking models that have evolved in the agencies studied here and suggest criteria for evaluating those models.

II. Regulatory Reform as Regulatory Relief.

In the late 1970s, federal regulation was often cited as one of the culprits underlying the "stagflation" that afflicted the American economy.[5] According to this view, government regulation was causing unnecessary price increases, stifling innovation, lowering productivity, and reducing the competitiveness of United States corporations abroad.[6]

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[5] See, e.g., Hearings on the Regulatory Reform Act of 1979 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. 1075 (1979) [Testimony of Business Roundtable].

[6] See generally, R. Benne, The Ethic of Democratic Capitalism ch. 8 (1981); J. Dunlop, Business and Public

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Bureaucratic demands for information were roundly condemned for unnecessarily adding to the burdens of large enterprises and for burying small enterprises under a mountain of "red tape."[7]

Some industries that felt themselves especially burdened by federal regulation petitioned Congress for specific relief.[8] Others approached the executive branch for relief.[9] Still others advocated moratoria on all rulemaking activities.[10] In all of these efforts, the regulated industries could point to a substantial body of academic critiques of the "social regulation" statutes and the regulations that implemented those statutes.[11]

These complaints were directed primarily to the substantive requirements of regulatory statutes and regulations. One obvious solution was to amend the individual statutes, and numerous efforts were directed toward that end.[12] Most of these efforts, however, proved unsuccessful.[13]

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[6] Policy (1980); M. Weidenbaum & R. DeFina, The Cost of Federal Regulation of Economic Activity (The Am. Enterprise Inst., May 1978) (Reprint no. 88).

[7] See, Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before the Subcomm. of the House Comm. on Government Operations, 96th Cong., 2d Sess. (1980).

[8] See, Steel Industry Compliance Act of 1981, 42 U.S.C. §§ 7401 note, 7410, 7413 (1982).

[9] See, e.g., Auto Companies Press for More Deregulation in Safety and Pollution, Wall St. J., Aug. 14, 1981, at 1, col. 6.

[10] See, 1-Year Moratorium Recommended on New Regulations, Wash. Post, Nov. 9, 1980, at G1, col. 4.

[11] See, e.g., B. Ackerman & W. Hassler, Clean Coal -- Dirty Air (1981); L. Lave, The Strategy of Social Regulation

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[12] For example, among the many proposals in 1981 for amendment of the Clean Air Act, industry supported

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[13] See generally, G. Eads & M. Fix, supra note 2, at ch. 4; McGarity, Regulatory Reform in the Reagan Era, __ Md. L. Rev. __ (forthcoming, 1985).

Many critics believed that much regulatory relief could be accomplished by imposing constraints upon regulatory agencies outside of the normal statutory amendment process. Recognizing that the authorizing committees were likely to be the most sympathetic to the substantive requirements of the existing statutes, some critics directed their attention to "omnibus" regulatory reform efforts such as imposing a regulatory budget upon all federal agencies.[14]

Other critics believed that the agencies had overextended their power beyond that intended by Congress. For these critics substantial substantive regulatory reform could be accomplished by interpreting substantive grants of rulemaking power more narrowly in future rulemaking efforts and re-examining past rules under the new narrower statutory criteria. This could be accomplished by statute or by executive order.[15] Regulatory relief would come about through direct substantive changes in federal laws and regulations rather than through procedural innovations.

III. Public Accountability and Regulatory Reform.

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[11] (1981); Crandall, Alternatives to the Administration's Initiatives, in Reforming Regulation 140 (Clark, Kosters & Miller eds. 1980).

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[12] elimination of PSD (prevention of significant deterioration) class II and III increments. Inside E.P.A., Oct. 2, 1981, at 2. Industry also supported major simplifications in the permit programs, suspension of key provisions of the pretreatment regulations, and withdrawal of EPA's cost reasonableness test for best conventional technology (BCT) requirements under the Clean Water Act. Inside E.P.A., Aug. 21, 1981, at 9.

[14] See, R. Litan & W. Nordhaus, Reforming Federal Regulation (1983); DeMuth, The Regulatory Budget, 29 Reg. (Mar./Apr. 1980).

[15] See, Regulatory Flexibility Act, 5 U.S.C. § 610 (1982) [requiring review of all agency rules existing on the effective date of the statute within ten years, and periodically thereafter], and Exec. Order No. 12,291 3 C.F.R. 127 (1982) at § 3(i) [requiring agencies to initiate reviews of rules already in effect at the time of the order].

Many critics of the new rulemaking agencies agreed with regulatory relief advocates that agencies were going beyond the original congressional intent in implementing the new regulatory statutes, but disagreed that substantive statutory change was the solution. Instead, these critics advocated increased political accountability as a solution to the problem of runaway agencies.[16] Two primary mechanisms were available to these reformers -- the legislative veto and executive control.

The legislative veto received an enormous amount of attention in Congress and in the academic literature.[17] Although it was enacted into more than two hundred federal statutes, there was little evidence that it provided an effective mechanism for systematic control over the federal bureaucracy.[18] In any event the debate over its efficacy became moot when the Supreme Court declared all familiar manifestations of the legislative veto unconstitutional.[19] Although some form of the legislative veto may still survive constitutional scrutiny, it is no longer likely to play a major role in the control of regulatory agencies.

Another political accountability device is systematic executive control of administrative rulemaking. As the history of Executive Order 12291 in Chapter 2 of this Report will demonstrate, the President has been active through at least three administrations in attempting to bring the regulatory functions of the "dependent" agencies under executive control. In the past several years executive control has been oriented heavily in the direction of reduced regulation. Therefore many of the proponents of regulatory relief are likewise proponents of executive control.[20] However, it is possible to favor

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[16] See generally, R. Litan & W. Nordhaus, supra note 14; W. K. Viscusi, Presidential Oversight: Controlling the Regulations, 2 J. Pol'y Analysis & Mgmt. 157 (1983); Miller, Lessons of the Economic Impact Statement Program, Regulation, July/August 1977, at 14.

[17] Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977).

[18] Bruff & Gellhorn, supra note 17.

[19] Immigration and Naturalization Service v, Chadha, 103 S. Ct. 2764 (1983).

[20] See, e.g., Hearings on the Regulatory Procedures Act of 1981 Before the Subcomm. on Administrative Law and

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executive control and corresponding agency accountability independent of the impact that it will have on individual regulatory efforts.

Executive control has had more success in the courts than the legislative veto. Although some judicial challenges to executive controls have been filed, they have by and large proven unsuccessful. Presidents have the power to "jawbone" the heads of dependent federal agencies in private to make known to the decisionmakers the Administration's policy on important regulatory issues.[21] Whether, under existing law, Presidents can direct federal agencies to reach particular regulatory results remains to be seen.[22]

A final vehicle for political accountability is enhanced public participation in the rulemaking process. Public participation has been urged as a prescription for regulatory reform since the 1960s, when the advocates of regulatory reform decried agency captivity at the hands of the regulated industries. It surfaced again, however, in the late 1970s as an element of most regulatory reform initiatives aimed at "overregulation," although the enthusiasm of the latest round of regulatory reformers for public participation is probably not as great as that of the the early reformers. In the early 1970s the Environmental Impact Statement was devised as a mechanism for offering the public and Congress a structured assessment of the environmental effects of major federal actions significantly affecting the environment. Similar proposals for "Inflationary Impact Assessments," "Regulatory Evaluations," and "Regulatory Impact Assessments" were implemented by executive order in the mid- and late-1970s.

IV. Rational Decisionmaking and the Two Rulemaking Cultures.

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[20] Government Relations of the House Judiciary Comm., 97th Cong., 1st Sess, 302 (1981) (testimony of Business Roundtable).

[21] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980).

[22] No court has held that the executive review provisions of Executive Order 12291 are unlawful. This may be attributable to the fact that OMB has not been especially aggressive in imposing Administration policy on federal agencies or to the fact that OMB has been very discrete in doing so.

Although the goal of "rational agency decisionmaking" seems unexceptional, its proponents have in mind a very ambitious undertaking. They mean to interject a new and very different way of thinking into a pre-existing bureaucratic culture. Following the convention of many students of the policymaking process, we may label this new kind of thinking "comprehensive analytical rationality."[23]

The "comprehensive analytical rationality" model derives from the "policy sciences" as practiced in the schools of public policy associated with many of the nation's major universities. I use the term "comprehensive" because this kind of thinking ideally explores all possible routes to the solution of a problem. I use the term "analytical" because this kind of thinking attempts to sort out, break down, and analyze all of the relevant components of a problem and its possible solutions. In addition, it manifests an explicit preference for quantitative analysis when that is possible. I use the term "rationality" because this kind of thinking takes pride in its objectivity and the dispassion with which it breaks down social problems into its components and analyzes the pros and cons of alternative solutions to those problems without regard to whose ox is being gored. Although there is no reason in principle why comprehensive analytical rationality should lean heavily upon any particular discipline, this kind of thinking has been dominated in the past by the paradigms of neoclassical micro-economics. The influence of economics is manifested in the way the comprehensive analytical rationality model defines problems, identifies alternative solutions to problems, examines the advantages and disadvantages of possible solutions, and ultimately prescribes answers to problems.

This new kind of thinking contrasts sharply with the thinking that has traditionally dominated the process of generating rules in the agencies that have been implementing the recent "social regulation." I shall refer to this traditional thinking as "techno-bureaucratic rationality."

Despite my general aversion to hyphenated adjectives, I use the term "techno-bureaucratic" to distinguish the thinking that dominates highly technical and complex rulemaking activities from bureaucratic thinking in general. "Techno-bureaucratic" thinking is a special brand of bureaucratic thinking that arises in the context of bureaucratic activities that must grapple with highly complex (and often unresolvable) issues of science, engineering, and public policy. Regulating benzene is not the same as running the post office. While there are many similarities in the way that bureaucrats in OSHA and the Postal Service think, there are also important differences. Some of the models of bureaucratic thinking, such as the perceptive "muddling through model," while relevant to "techno-bureaucratic" thinking, do not shed as much light as they do in the context of bureaucratic programs, such as health care and welfare administration, that do not have highly technical components.

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[23] See, G. Edwards & I. Sharkansky, The Policy Predicament 6-10 (1978); C. Lindblom, The Policy Making Process (1968); Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 414 (1981); Rodgers, Judical Review of Risk Assessments: The Use of Decision Theory in Unscrambling the Benzene Decision, 11 Envtl. L. 301 (1981).

I use the word "rationality" because, unlike many students of regulation, I do not believe that this kind of thinking is per se irrational. Like comprehensive analytical rationality, techno-bureaucratic rationality can produce irrational regulatory results. But health scientists, engineers, and other practitioners of techno-bureaucratic rationality are no less rational for that. Techno-bureaucratic rationality is a rationality built on a unique understanding of the regulatory universe that comes only with hands-on experience. It is a rationality born out of frustrating experience with unanswerable questions of extraordinary complexity. It is, in a sense, a "second best" rationality that recognizes the limitations that inadequate data, unquantifiable values, mixed societal goals, and political realities place on the capacity of structured rational thinking, and does the best that it can with what it has.

A. Techno-Bureaucratic Thinking in the Traditional Rulemaking Process.

The traditional model of the rulemaking process arose in the early 1970s as the agencies began to implement through rulemaking the new social agendas and the new statutes that resulted from the social ferment of the 1960s. Under this model, which held sway until the latter quarter of the decade, a statute, an external petition, public pressure, or the discovery of an internal problem provides the initial stimulus for rulemaking. An office within the regulatory agency (I shall use the generic term "program office") either takes or is given responsibility for providing the institutional response to the stimulus. At this point the issue loses whatever high level visibility it ever had, and becomes submerged within the agency for a period of time, which may extend to years, while the program office generates a solution to the problem.

The program office is staffed largely by persons with technical training in the technical field or fields with which the office generally deals. For example, the program office in an agency with responsibility for ensuring meat and poultry safety would be composed largely of nutritionists and persons with training in the slaughter and processing of meat and poultry. The program office in an agency charged with establishing price supports for dairy products would be staffed largely by agricultural economists. And the program office of an agency charged with setting air pollution control standards would be staffed largely by health scientists, pollution control engineers, materials scientists, and perhaps an economist or two to assess the costs of various proposals.

Although most of the professional personnel in the program office have graduate degrees, they generally would not be classed at the top of their fields. These specialists do not conduct independent research in the areas of their expertise; rather, they are rule managers with technical training in the subject area of the rules. Their primary responsibilities consist of gathering technical information, evaluating its quality, assembling it into a coherent whole, participating in intra-agency working group meetings, drafting rulemaking documents for publication in the Federal Register, reading and analyzing public comments, and drafting memoranda summarizing the contents of various documents for upper level decisionmakers. Their primary responsibility is to help program managers shepherd the rulemaking process along in a timely fashion so that it produces rules that will survive judicial and political review within the agency's internal or external time constraints.

Under the traditional model, the program office has many sources of information concerning the issues that arise in a rulemaking effort. The agency might have a "research office" that sponsors research projects aimed at producing information in a usable form for rulemaking. In addition, either the program office or the research office might have funds available for contracting with independent consulting companies to study technical issues and prepare reports suitable for rulemaking efforts. Finally, the staff of the program office interacts routinely with their counterparts from the regulated industries, and these interchanges produce data and information that are helpful in formulating and supporting rules.

Ultimately, the studies available to the program office invariably prove inconclusive, and the office is faced with the dilemma of regulating in the face of substantial uncertainty or doing nothing and studying the matter further. On this question, the natural tendency of the program office (and usually the Office of General Counsel) is to forge ahead. The General Counsel's Office, reacting to the threat of a "bureaucracy-forcing" lawsuit from the potential beneficiaries of the rule,[24] may exert pressure on the program office to act. The staff employees of the program office believe that they are in the final analysis judged by their superiors on the basis of the number of rules that they produce over time. It can be difficult for a program office staffer to explain to a superior that he or she has spent the last two years studying a problem only to conclude that it needs further study. A staff employee that reaches this conclusion too many times may not get fired, but such a performance is not likely to put the employee on the fast track to promotion within the institution. Moreover, on a personal level, it is probably more rewarding to a program office staffer to bring about a concrete resolution to a problem than to conclude that the problem does not warrant a regulatory solution.

In deciding what to do in light of all of the uncertainties, the tendency of the engineers and scientists in the program office is to attempt to "solve" the problem. The process of defining and gathering information about the problem will generally suggest at least crude solutions to the problem. If the agency's statute tells it to provide a "safe" workplace or environment and if a chemical in the workplace or the environment causes harmful effects on animals or humans, the scientists focus their energies toward discovering the level of exposure that will cause no harm. They may search the existing data for a "no observable effects" level and throw in a "safety factor" for good measure. If the statute directs the agency to consider the "feasibility" of its prescriptions, then the engineers in the program office might survey existing pilot plant, and theoretical technologies for controlling the release of chemicals to determine whether or not it is "technologically feasible" to implement a technology beyond those currently in use. After they have located a few possibilities, they may make some rough estimates of the costs of installing them and exclude one or more on the ground that they are not "economically feasible."

All of these determinations are heavily tinged with "professional judgment." Since the data rarely compel a particular result, a lot of the thinking process is really based upon a sort of intuition that is informed by technical training and experience. The technical experts do not "analyze" the problem and "derive" a solution so much as they "feel" their way through to an answer, accommodating as many affected interests as possible along the way to reduce the external resistance to their ultimate resolution of the problem.

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[24] A bureaucracy forcing action is one designed to secure a court order that the agency bring a rulemaking action to completion within a specified period of time. These actions can be authorized by statute when Congress has provided precise deadlines for regulatory actions, or they can be in the nature of mandamus action for administrative relief unreasonably withheld. See generally, J. Bonine & T. McGarity, The Law of Environmental Protection 869 (1984).

The technological experts in the program office are not likely to look for just the right mix of risk reduction and regulating expense that optimizes the use of society's resources. Given the uncertainties that confound the analysis of the problem, the suggestion that the solution could be arrived at through a careful balancing of costs and benefits would be farcical to the program office staffer, who is probably inclined to regard economics as a "soft" science in any event. Nor is it likely that the engineers in the program office will define the problem in innovative ways so as to suggest radically different solutions, such as screening susceptible workers out of particular workplaces or effluent taxes, if such solutions are not explicitly suggested in the agency's statute or the engineering discipline.

At any given point in the gradual evolution of a solution to a regulatory problem, the program office considers only a very limited range of options. Given the constant pressure to reach results, the program office staff is naturally reluctant to expand the universe of options that require study.

Once the program office has hit upon a "solution" to the problem, it is resistant to suggestions that it consider different alternatives to the same regulatory ends. Because the problem-solving effort has usually resulted in the expenditure of substantial time and resources, the program office is especially resistant to any suggestions that would require it to go "back to the drawing board." This institutional resistance to change solidifies as the agency's proposal progresses up the chain of command in the program office. After the Director of the program office has agreed to the proposal, the entire technical staff of the agency stands behind it.

The program office approach to the problem fits the "muddling through" model in that the evolution of a rule is often hesitant and incremental.[25] It does not, however, retain much of the "remedial" characteristic of that model, because the technical staff in the program office do not often have the time, inclination, or resources to go back and do the job right. If the technical or political objectives to a rulemaking effort are strong enough, the technical staff are as likely to abandon the effort and move on to other things as to attempt to fix the defective rule.[26]

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[25] See, D. Braybrook & C. Lindblom, A Strategy of Decision (1963); Diver, supra note 23, at 399.

After the program office has agreed upon a solution to the regulatory problem, it will then draft a "decision memorandum" for the upper level politically appointed decisionmakers. For a typical rule, the memo will list three options, discuss the first and last options in a cursory fashion, discuss the second option in great detail, and recommend that the agency adopt option number two. Unless the upper level decisionmakers are willing to devote a substantial amount of time to studying the problem and the program office's proposed solution, they will usually agree to option number two or some minor variation thereof.

At this point the proposal is published in the Federal Register for comment. If the public comments reveal flaws in the staff's technical work or produce new technical data that the staff has not yet examined, the staff will consider the comments and amend the rationale and perhaps even change the content of the rule. Depending upon the seriousness of the flaws in the staff's original analysis, the reexamination may take from several weeks to more than a year. If the comments are particularly damaging, the staff may have to go back to the drawing board and re-propose the rule with a new "solution" and rationale. However, for the same reasons that the staff is resistant to suggestions for change emanating from within the agency, it is resistant to suggestions for change coming from outside the agency in the public comment process. Therefore, drastic overhauls, while not unheard of, are rare.

The foregoing characterization of the techno-bureaucratic rulemaking model never described reality with great precision. Some program office technicians were sufficiently educated in and had enough respect for economics that they might use marginal analysis in choosing among options. Some agency heads would not allow themselves to become "captured by the bureaucracy," and they would demand that the program office consider a broader range of options whether or not it was so inclined. And, undeniably, program offices on many occasions elected to study regulatory problems further rather than attempt to solve them immediately. Still, this description of the internal rulemaking culture prior to the mid-1970s bears a reasonable resemblance to reality, and it is a fairly accurate description of the decisionmaking processes in many agencies today. The internal agency culture described here was (and is) dominated by techno-bureaucratic rationality, the essential elements of which are as follows:

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[26] Under the traditional view of the technical rulemaking process, the agency does not spend a great deal of time reassessing the accuracy of its previous decisions. It simply does not have the time, the resources, or the inclination to do so. For example, rather than responding to a series of judicial remands of its effluent limitation guidelines promulgated under the Clean Water Act, EPA simply gave up the effort rather than reassess the aspects of the rules that were remanded. See, McGarity, Media Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation, 46 Law & Contemp. Probs. 159, 212-15 (1983).

(1) Mission Orientation -- Unlike the vague "public interest" standard that dominated early economic regulation statutes, the newer statutes (and recent amendments to older statutes) are often more precise in establishing their goals. In addition, the people who gravitate toward the newer agencies are often attracted by those goals. This produces a general perception within the agency that it has a "mission." This perception, in turn, helps build morale and attract fresh talent. Since government service rarely pays talented professionals as well as private employment, one way to attract and keep bright and energetic professionals on the payroll is to allow them to experience a sense of accomplishment in helping to achieve real societal improvement. Perhaps the starkest example of the role of "mission orientation" in building morale among professional employees is the dramatic decline in morale at the Environmental Protection Agency during the "Gorsuch era," when top level management attempted to dispossess the agency of this sense of mission, and the corresponding boost in morale in that agency when the new Administrator stressed the agency's environmental "mission" in several communications to staff and the press. While most sensible bureaucrats recognize that society will not tolerate the unrestrained pursuit of a single statutory goal, they nevertheless believe that some goals should be afforded greater weight among the competing considerations. This kind of thinking especially characterizes the program office, because those offices have the principal institutional responsibility for implementing the agency's statutory responsibilities.

(2) Professional Perspective -- The program offices are inhabited largely by professionals -- scientists, engineers, economists, lawyers, and the like. A professional brings to his or her job a particular perspective that to a large extent defines the way in which he or she goes about performing his or her duties. This perspective is shaped through years of training and experience. Engineers and scientists are inclined to define a problem differently than lawyers and economists and to approach problem solving in a different way. The observation that engineers in an agency think more like

engineers in the private sector than they think like agency economists is therefore trite and true.[27]

(3) Action-Orientation -- The program office is usually action-oriented. The program office staff perceives that it is evaluated in part on the quantity of product that it manufactures, and its product is rules and regulations. Therefore, the program office can become impatient with delays that are imposed by other offices in the agency. The tendency of the office is to move forward with rulemaking efforts even when more study might enhance the understanding of the problem.

(4) Restricted Planning Horizons -- Like many private institutions, the agency program office cannot afford to spend much time studying the long-range implications of its activities. Its action orientation and its perennial resource shortage tends to focus its attention on the present. The office is always too busy resolving today's problems to think about tomorrow's. Regulating mechanically separated red meat stringently, for example, may mean that the agency may be forced at some point in the future to address its relatively lax requirements for mechanically separated poultry, but that is a problem for another day. If the agency had to resolve both issues simultaneously, it would never get either substance adequately regulated.[28] The agency is only capable of dealing with one set of outraged industry officials and consumers at a time.

(5) Bounded Options -- Closely related to the "restricted planning horizons" characteristic of techno-bureaucratic rationality is the tendency of that way of thinking to narrow options very early in the decisionmaking process and to be unreceptive to new options that come to light later in the process. The professionals in the program office define the "problem" in fairly narrow technical terms and immediately begin the search for the "solution" to the problem. The very definition of the problem may eliminate options. For example, if the problem is defined to be "find the best pollution control technology for this particular sort of industrial facility," then options such as in-plant process changes or changing feedstocks are not likely to receive much attention. More innovative approaches, such as "bubbling" or emission fees, are even less likely to occur to the scientists and engineers in the program office. After the program office has defined the problem, it quickly forecloses unattractive approaches, and the technical staff rapidly heads down a single path to a single solution. If that path ultimately proves

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[27] G. Benveniste, The Politics of Expertise 90 (1977).

[28] See, MSM Case Study, Appendix A to this Report.

unrewarding, the staff will back up and then head down another likely path.

(6) Turf Consciousness -- Perhaps the most powerful tendency of any program in a regulatory bureaucracy is to protect and, if possible, expand its "turf." A program's "turf" consists of the regulatory issues that come within its domain and the discretion to decide those issues. A program's turf is defined in the first instance by its organizational structure. The Environmental Protection Agency could, for example, give the Office of Pesticides and Toxic Substances (which administers the Toxic Substances Control Act) the responsibility for implementing the toxics control sections of the Clean Air and Clean Water Acts or it could assign those responsibilities to the Office of Air and Radiation (which administers the other sections of the Clean Air Act) and the Office of Water (which implements the other sections ot the Clean Water Act).

In addition, turf is defined within agencies by the nature of the review that a program office's decisions must endure. The program office whose recommendations move straight up the chain of command to the head of the agency has more turf than the program office whose recommendations must receive "sign-off" review by several other offices within the agency. Finally, turf is defined in other subtle ways, such as who chairs intra-agency working groups and who has direct access to upper level decisionmakers. Obviously, turf can depend heavily on personalities and upper level decisionmakers' perceptions of the capabilities of particular program offices, but it can also be a matter of relatively permanent institutional arrangements. During transitional periods, "turf battles" absorb an agency's institutional energies to a surprising degree.

B. Comprehensive Analytical Thinking in Regulatory Reform.

The regulatory reformers of the mid 1970s who called for more "rational" regulatory decisionmaking had comprehensive analytical rationality in mind.[29] The ideal regulatory

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[29] The essential elements of a rational policy analysis have been stated on many occasions in the policy analysis literature. Edwards and Sharkansky list the following elements of a rational policy analysis:

1. Identify a problem and its cause(s).
2. Clarify and rank goals.
3. Collect all relevant options for meeting each goal and all available information on them.

(Continued on next page)

bureaucracy, under this comprehensive analytical model, would react to a petition for rulemaking, a statutory command, or public pressure by assigning the matter to a regulatory analyst -- a professional with training in policy analysis or economics who knows how to analyze a problem comprehensively and rationally. The regulatory analyst would first define the regulatory problem as carefully as possible. Because comprehensive analytical thinking as currently employed depends so heavily upon the paradigms of neoclassical microeconomics, the policy analyst would probably define the problem in terms of market failure. For example, an environmental problem would be defined in terms of "externalities," and a consumer fraud problem or a worker safety problem would be defined in terms of information inadequacies. If no market failure could be identified, the analyst would conclude that there is no problem, and he or she would recommend that the market be allowed to function unimpeded.

Having identified the problem, the regulatory analyst would next clarify and rank the agency's goals. This may have

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[29] (Continued from previous page)

4. Predict the consequences of each alternative and assess them according to standards such as efficiency and equity.
5. Select the alternative that comes closest to achieving the goal and is most consistent with the standard of evaluation.

G. Edwards & I Sharkansky, supra note 23, at 7.

Lindblom has a similar list:

1. Faced with a given problem,
2. a rational man first clarifies his goals, values, or objectives, and then ranks or otherwise organizes them in his mind;
3. he then lists all important possible ways of -- policies for -- achieving his goals
4. and investigates all the important consequences that would follow from each of the alternative policies,
5. at which point he is in a position to compare consequences of each policy with goals
6. and so choose the policy with consequences most closely matching his goals.

C. Lindblom, supra note 23, at 13. See generally, A. Meltsner, Policy Analysts and the Bureaucracy 115-116 (1976); Jenkins-Smith, Professional Roles for Policy Analysts: A Critical Assessment, 2 J. Policy Analysis & Mgmt. 88 (1982). Executive Order 12291 to a large extent requires just this sort of analysis.

already been done by Congress, but very often Congress articulates several (often inconsistent) goals for a particular regulatory regime, in which case the analyst would seek the guidance of upper level policy makers.

The regulatory analyst would next call upon the agency's scientists and engineers to identify as many options for addressing the problem as possible. The analyst also might suggest some alternatives from the economists arsenal, which includes effluent charges, marketable permits, "bubbles," and assorted other indirect incentives. Economists in the program office or perhaps the regulating analysis office would be asked to "cost out" the options. Preferably, this effort would produce an assessment of both the primary costs of the regulation to the regulated industry and the secondary costs in terms of increased prices to consumers, lost jobs, and foreign trade deficits. Other scientists and engineers would conduct studies, assemble data, and construct models to predict with as much precision as possible the benefits of the various alternatives. If these calculations could be reduced to monetary terms, then the costs and benefits of each option would be computed and the analysts would recommend that the upper level decisionmakers adopt the option for which the benefits exceeded costs by the greatest amount. If benefits could not be stated in monetary terms, then they should be stated in equivalent units so that the analysts could assess the "cost-effectiveness" of different options in meeting a given benefit.

The defining characteristics of comprehensive analytical rationality are very different from those of techno-bureaucratic rationality. It should be noted, however, that while the preceding list of characteristics of techno-bureaucratic rationality was derived from a generalized description of the actual decisionmaking process, the following description of the characteristics of comprehensive analytical rationality is based upon an abstract ideal that could never be reached in the real world. Nevertheless, it is useful to examine these characteristics and observe how they vary from those of the rulemaking model as it existed in the mid-1970s.

(1) Neutrality -- Comprehensive analytical rationality is first and foremost neutral. It serves no masters save the truth. Hence, regulatory analysts are never "advocates" of particular policy goals, and they do not care whose oxen are gored. Regulatory analysis is grounded in facts. The facts are marshalled to examine policy options. And the selection from among the alternatives is dictated by an assessment of the extent to which each thoroughly analyzed option furthers an independently ranked set of policy goals. It is up to the upper level decisionmaker to rank goals; the analyst merely informs the decisionmaker how the options stack

up against those goals without regard for the analyst's own beliefs about their proper ranking.

(2) Objectivity -- Closely akin to the regulatory analyst's neutrality is his or her objectivity.[30] The analyst's assessment of the pros and cons of policy options must rely upon hard facts and verifiable theories. It cannot be based upon "soft" quasi-empirical observations of the sort that sustain editorial writers and motivate legislators. Most importantly, the regulatory analyst's work product should not reflect his or her personal views about how the regulatory universe is or ought to be structured.

(3) Quantitative Orientation -- Consistent with his or her preference for neutrality and objectivity, the analyst would prefer to quantify the considerations that go into a policy decision to the fullest extent possible.[31] Rather than conclude that exposure to an animal carcinogen may cause cancer in humans and factor that determination into the decisionmaking calculus, the regulatory analyst would prefer to employ a risk assessment model to calculate the number of cancers that may be caused at several levels of exposure. Such a quantitative risk assessment might form the basis for a "risk-benefit" analysis of the chemical's use. The regulatory analyst might press even farther to quantify the total benefits to society that result from regulatory options by assessing a monetary value to cancers avoided (or cancer risks avoided) and thereby facilitating a comparison of the costs and benefits of the regulatory action.

(4) Comprehensiveness -- As the term "comprehensive analytical rationality" suggests, the regulatory analyst views regulatory problems comprehensively. He or she is reluctant to screen out options until they have been thoroughly analyzed and compared to other alternatives. He or she is constantly on the lookout for fresh options that may have escaped his or her attention or that of other agency decisionmakers.

(5) Thoroughness -- The regulatory analyst scours every source of data and information relevant to the policy choice. No datum is too insignificant and no piece of objective information too trivial to escape the analyst's attention. All available information should be factored into the policy analyst's equations. In addition, the regulatory analyst has a decided preference for undertaking more research and sponsoring more studies, rather than moving ahead precipitously.[32]

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[30] See, A. Meltsner, supra note 29, at 11, 52.

[31] G. Benveniste, supra note 27, at 73.

[32] See, A. Meltsner, supra note 29, at 115.

(6) Consistency -- Regulatory analysts have a preference for consistency in the application of policies to particular regulatory problems. The set of policies that a decisionmaker invokes to solve one problem should be the same set of policies that he or she invokes to solve the next similar problem. The ranking of goals for one policy analysis should not vary from problem to problem absent an explicit change in agency policies. The outcome of agency decisions should not depend upon "political" considerations that change from case to case.

(7) Open-Ended Perspective -- To the regulatory analyst, no decision is ever really final. Recognizing that previous decisions were based upon incomplete information, the agency should undertake retroactive studies to assess the accuracy of those decisions. New information from retrospective studies or elsewhere may reveal that previous assumptions were bad, and thereby undermine previous decisions based on those assumptions. The re-ranking of policy goals that can occur with changes in administrations can mean that old policy decisions are no longer correct, because they were designed to implement policy goals that no longer have high priority. While the agency should not be free to make inconsistent decisions, it should be flexible enough to admit when it is wrong and to accept changed policies.

(8) Openness -- The regulatory analyst prefers to have the reasons for an agency's decisions stated on paper for public consumption. Agency decisionmakers should base their decisions on explicit policies that they are willing to articulate in advance. Likewise, the agency's ranking of goals should be explicit and available for public consumption. Finally, the analogical process should be open to the public so that facts can be probed and assumptions challenged.

(9) Professional Perspective -- Like the scientists and engineers in the program office, the regulatory analyst has a professional perspective. The regulatory analyst's perspective arises to a very large degree from neoclassical micro-economics.[33] This perspective gives the policy analyst a preference for market-oriented solutions to regulatory problems. It likewise creates an adversity to "command and control" regulatory solutions that substitute bureaucratic guidance for functioning markets.[34] This perspective shapes the way that the regulatory analyst defines problems -- he or

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[33] See, A. Meltsner, supra note 29, at 118. Meltsner maintains, however, that policy analysts generally exhibit a variety of professional training and cognitive styles.

[34] See, Behn, Policy Analysis and Policy Politics, 7 Policy Analysis 199 (1981).

she sees them as instances of market failure -- and the way that he or she goes about solving them -- he or she searches for unintrusive ways to correct the failure.

C. The Clash of Rulemaking Cultures.

The two patterns of thinking described above are not especially harmonious. They are two very different ways of going about solving regulatory problems. As between the two, a person charged with designing an ideal regulatory regime would unquestionably elect "comprehensive analytical rationality" over "techno-bureaucratic rationality." The techno-bureaucratic rationality described above is a decisionmaking perspective that has been forced to come to terms with reality -- the reality of poor and nonexistent data, resource limitations, and time constraints. While the comprehensive analytical rationality model is an attractive ideal, the regulatory analysts must work within the same reality as the scientists and engineers. As we shall see, when it is forced to come to terms with reality, comprehensive analytical rationality must compromise some of its lofty ambitions. Nevertheless, most regulatory analysts would argue that even substantially compromised, the comprehensive analytical model represents the better approach to decisionmaking. And herein lies the rub of a clash between two dissimilar rulemaking cultures.

Perhaps the strongest component of the clash concerns the nature of neutrality and objectivity. Techno-bureaucratic rationality does not concede to being entirely subjective in its approach to regulatory decisionmaking. The "techno-bureaucrats" would argue that their enthusiasm for objectively verifiable facts is at least as ardent as that of the "comprehensive analysts." When they have the luxury of hinging their recommendations on objective facts, they are thrilled to do so. Unfortunately, in complex rulemaking proceedings, agreed upon facts are few and far between. The existing data are sparse and always subject to many different interpretations. Since regulatory decisions can seldom wait until all of the studies that are necessary to secure agreement are done, the techno-bureaucrats must rely upon an informed intuition often called "scientific" or "engineering judgment." This judgment rests on training and experience, not subjectivity or bias. Relying on professional judgment may not be as objective as relying upon pure facts, but it is an acceptable second-best alternative, given the circumstances.

The techno-bureaucrats would further argue that the touted "neutrality" and "objectivity" of the comprehensive analysts is in reality neither neutral nor objective, because comprehensive analytical rationality is so thoroughly dominated by neoclassical economics. The starting point of the comprehensive analysts -- that the sole rationale for regulation is to cure market defects -- represents a bias against regulation, because it implicitly recognizes no goals for regulation other than efficiency. Other societal goals, such as fairness and equality, have no room in the comprehensive analyst's regulatory analysis. Another indication of bias is the implicit assignment of the burden of proof to the person advocating regulation; in a world dominated by uncertainties, this burden can rarely be met. Further, the comprehensive analysts' preoccupation with quantification causes them to "dwarf soft variables" that are not easily quantified, but are nevertheless relevant to intelligent regulatory decisionmaking.[35] Finally, the huge uncertainties that dominate many of the most important rulemaking issues confound any objective attempt to make the kinds of accurate predictions necessary for comprehensive analysis. The best that can be done is to make the best judgment that one can and let policy considerations fill the factual gaps.

The comprehensive analysts would respond that things are not as bad as the techno-bureaucrats would lead one to believe. If the techno-bureaucrats were not in such a rush to get a rule on the books, they might be able to undertake the research necessary to reduce some of the uncertainties that make objective analysis difficult. The comprehensive analysts would further argue that the policy sciences have developed many techniques for monetizing difficult-to-value considerations such as health and environmental amenities.[36] In any event, comprehensive analysts would argue that the difficulties encountered in assessing the benefits of rules is no excuse for virtually ignoring their costs.

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[35] See, Tribe, Ways Not to Think About Plastic Trees: New Foundations for Environmental Law, 83 Yale L. J. 1315, 1319 (1974).

[36] Diver lists several techniques for "reducing the gap between rationalist ideals and administrative practice:"

> Probability theory, for example, enables analysts to cope with the omnipresent reality of uncertainty. Sophisticated econometric, queuing, diffusion, and demographic models help predict the remote consequences of particular actions. Discounting enables the decisionmaker to assign present values to future outcomes. Linear programming algorithms perform mindbending resource allocation computations at the touch of a key. Multiple regression analysis exposes complex causal links. And "shadow prices" help assign values to nonmarket commodities like clear air and human life.

Diver, supra note 23, at 397; see also, Tribe, supra note 35, at 1319-22.

A second battleground concerns the role of time constraints in decisionmaking. The comprehensive analysts generally prefer to engage in a thorough data-gathering and options-identification effort before making any decisions that would have the effect of eliminating options. They would like to do research, build mathmatical models, and make detailed projections concerning the primary and secondary impacts of as many options as possible. Indeed, comprehensive analysts would not have the agency limit its study of the problem to the time during which it is actively considering what regulations to promulgate. They would have the agency continue to study the problem after the rule has been promulgated to determine whether the predictions and projections were accurate, always with an eye toward changing the rule in light of new facts and theories.

To the comprehensive analysts' complaint that the techno-bureaucrats unnecessarily limit options too early in the decisionmaking process and similarly fail to consider the long-range implications of their efforts, the techno-bureaucrats respond that there will never be enough time and money to consider all of the options that the human mind can imagine. Every choice has an infinite range of options. To place too many options on the regulatory menu invites "paralysis by analysis." The program office simply cannot do its job if it must "study the problem to death;" nor can it spend significant resources "re-inventing the wheel" when new evidence about an old regulation comes to light. There are simply too many pressing new problems to deal with, without re-opening old wounds.

A third, but perhaps less important, battleground concerns the extent to which the agency should subject its reasoning process to intense public scrutiny. While both the techno-bureaucrats and the comprehensive analysts advocate public participation in agency decisionmaking, they invite that participation for somewhat different reasons. The techno-bureaucrats desire public participation for the technical information that it can make available to the engineers and scientists. Sophisticated commenters can perform their own studies and gather data that the program office may have missed. The techno-bureaucrats have little use for broad, nontechnical comments directed toward the policy implications of the agency's action.

While the comprehensive analysts share the techno-bureaucrats' desire to receive technical comments on the agency's scientific, engineering, and economic analyses, they also value policy-oriented comments. According to the regulatory analysts, one of the primary purposes of the public documents that the agency publishes is to relate in a straightforward fashion the factual conclusions that the agency draws to an explicit pre-existing policy framework. The public should be aware of the way that the agency is bringing policy considerations to bear on regulatory problems, so that the agency may ultimately be held accountable for its actions in the political review process.[37]

The preceding dialogue is neither theoretical nor academic. Most of the arguments reproduced above were related to the author of this Report by employees in program and policy offices of agencies in which the two cultures have been drawn together into a single decisionmaking process. If the goal of regulatory reform is to bring comprehensive analytical rationality to bear on a pre-existing rulemaking process that has been dominated by techno-bureaucratic rationality, then the regulatory reformer must accomplish one of two objectives. Either he or she must purge the agency of techno-bureaucratic thinking and replace the existing bureaucracy with comprehensive analysts, or he or she must erect a decisionmaking structure that includes both modes of thought and harnesses the inevitable clash. The first option is not realistic. An agency that is required to make decisions involving highly technical subjects within a mandated time frame simply cannot avoid techno-bureaucratic thinking. Chapter 5 of this Report is therefore devoted to a search for procedural mechanisms that are capable of avoiding the destructive tendencies of the clash between the two cultures and in inducing a "creative tension" that brings out the best of both cultures in a way that enhances the quality of the rulemaking output.

V. Regulatory Analysis as a Vehicle for Regulatory Reform.

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[37] In this concern, the policy office is joined by the Office of General Counsel which is likewise concerned that the agency explicitly relate policy to facts in the rulemaking record for purposes of judicial review. However, the Office of General Counsel will insist that the agency apply only such policy considerations as the agency's statute allows. This can cause a clash with the policy office when the agency in reality applies a forbidden policy, such as an implicit cost-benefit analysis in setting an occupational health standard for a toxic substance. At this point, the Office of General Counsel may insist that the agency change its public rationale or redecide the issue according to different criteria.

Although the regulatory reform initiatives have spun off in many different directions, the three regulatory reform themes -- regulatory relief, public accountability, and rational decisionmaking -- merged in the regulatory analysis requirements of three Executive Orders and the Regulatory Flexibility Act. Indeed, the regulatory analysis requirements are probably the only regulatory reform tools that have been successfully implemented across-the-board for all nonindependent federal agencies. While the relative dominance of one or another of the three regulatory reform themes has varied through the years, they have always been reflected in the goals that have been set for the regulatory analysis requirements.

The requirement that an agency prepare a special document analyzing the pros and cons of several regulatory options (hereinafter called a "regulatory analysis document") should induce someone in the agency to think in comprehensive analytical terms. The extent to which agency employees actually adopt a comprehensive analytical approach to drafting the documents depends in part upon the specificity with which the document must address and quantify the costs and benefits of various regulatory options. Perhaps the least ambitious goal that has been advocated for the regulatory analysis process is simply to make existing information on the costs of a particular regulation available to the relevant decisionmaker in a digestible and coherent form. A slightly more ambitious statement of the purpose of regulatory analysis would say that the goal is to examine both primary cost impacts on regulated entities and secondary impacts, such as expected price increases, plant closures, and shifts in demand away from particular products. If regulatory analysis performed one or both of these two functions, it could at least ensure that the agency was sensitive to cost considerations as it decided what rules to propose and promulgate.

An even more ambitious goal is to explore several regulatory options before deciding upon a single approach. A regulatory analysis document would meet this goal if it laid out for the decisionmaker a series of options more comprehensive than the "three-options-with-an-obvious-choice" statement of options that typically characterizes the program office's options memo. The regulatory analysis document can be a convenient vehicle for considering options early on in the decisionmaking process.

A still more ambitious role for the regulatory analysis document would be to analyze the "cost-effectiveness" of the relevant options. A cost-effectiveness analysis would take as a given a particular regulatory goal and measure the cost that each regulatory option would entail in reaching that goal.[38]

Perhaps the most ambitious regulatory analysis goal is for the policy analyst to undertake a thorough anlaysis of the costs and benefits of several relevant options. This would require at the very least that the policy analyst "cost out" several options as in a cost effectiveness analysis. In addition, however, it would require the policy analyst to calculate and monetize the benefits of the regulatory options.[39]

Even if the agency can draft a document that analyzes regulatory options, comprehensive analytical thinking need not become a part of the agency's decisionmaking regime. The document may become a mere appendage to the decisionmaking process, a post hoc rationalization for decisions previously reached on other grounds, or a paperwork requirement to be avoided if possible and ignored in any event. The requirement that the agency draft a regulatory analysis document in no way guarantees that the agency will actually bring comprehensive analytical thinking to bear on its regulatory problems.

The regulatory analysis requirement can, however, have an important impact on the agency's decisionmaking process in a subtler fashion. The agency may not have personnel with training in regulatory analysis capable of assembling a regulatory analysis document. It may therefore have to hire a staff of professionals capable of thinking analytically. The agency may, in other words, have to hire a "regulatory analysis office." The regulatory analysis office can, like the documents it produces, be ignored. But the agency will now have within it an institution with an avowed commitment to comprehensive analytical thinking that is capable of acquiring its own "turf" within the agency. If the upper level decisionmakers are impressed with the quality of the regulatory analysis office's analysis, they may assign that office a greater role within the agency.

The prominence of the role that the regulatory analysis office plays may wax and wane as different upper level decisionmakers with differing commitments to policy analysis are appointed. If the regulatory analysis documents are subject to review by an institution that is committed to comprehensive analytical thinking, and if that institution has the power to veto or delay decisions that are not supported by adequate regulatory analyses, then the agency will have to assign a greater prominence to regulatory analysis whether or not its upper level decisionmakers have a commitment to rational analysis. Thus, the requirement that an agency prepare regulatory analyses for some decisions may give rise to a new institutional entity that can compete with the techno-bureaucratic thinking of the program office. And this institutionalization of comprehensive analytical thinking can in turn have a profound impact on agency decisionmaking.

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[38] See, L. Lave, supra note 11, at 17-19.

[39] See, L. Lave, supra note 11, at 23-25.

The regulatory analysis requirement can also address the "bureaucratic accountability" theme of the regulatory reform movement. The regulatory analysis document can provide the vehicle for political review of the basis for an agency rule. While the preamble to the proposed and final rule could likewise serve as a vehicle for political review of rulemaking, the regulatory analysis document may be better suited to this purpose because its primary function is to explore the impacts of a rule. Political reviewers and members of the public are no doubt concerned about the scientific and technical underpinings of a rule, but they are usually more concerned with the likely impacts of the rule on affected constituencies. They are also interested in the impacts of alternatives that the agency did not choose. Since the regulatory analysis documents are specifically tailored to address these two inquiries, they are ideal for a political review function.

Regulatory analysis documents can inform the President, Congress, and the public of the "bottom lines" of the options that the agency considered. In addition, they should identify the specific policies that the agency was trying to implement in promulgating the rule. The various political entities may react accordingly, exerting pressure in ways calculated to ensure that the agency is accountable to its constituencies. The regulatory analysis documents can even enhance the quality of the public comment by forcing the commenters to focus precisely on the facts and the assumptions that the agency identifies. Rather than filling the record with platitudes, the public commenters will be required to address specific comments to the agency's quantitative assessments of costs and benefits.

Finally, the regulatory analysis document can provide an indirect vehicle for regulatory relief. Forcing agencies to come to grips with the economic consequences of their actions may cause them to think twice about issuing new regulations. In addition, to the extent that regulatory analysis documents identify affected groups who might not otherwise be aware that the rule would affect them, they can be expected to object to the regulation, and regulatory relief may likewise result. Finally, to the extent that policy analysis as currently practiced is biased against regulatory intervention into the marketplace, and to the extent that the regulatory analysis office has acquired influence in the agency, regulatory relief may be the expected result. All of these predicted effects, however, are indirect, and they depend upon the validity of assumptions about the regulatory nature of policy analysis that may not reflect reality.

CHAPTER TWO
EVOLUTION OF THE REGULATORY ANALYSIS PROGRAM

While it is unlikely that agencies were ever free to disregard completely the impact of their rules on regulatees and the public, formal requirements that agencies prepare documents detailing regulatory impacts have been in existence for less than a decade. The idea that agencies should prepare a separate regulatory analysis describing the costs and benefits of proposed and final rules and credible rulemaking alternatives probably originated with the National Environmental Policy Act of 1969 (NEPA).[1]

Not long after the judiciary made it clear that NEPA's Environmental Impact Statement (EIS) requirement was more than an exhortation to the agencies to consider the environmental effects of their major actions,[2] the agencies settled down to the business of incorporating environmental considerations into the decisionmaking process for resource development projects and regulatory actions. Observing the power of this new tool to enlighten agency action and (perhaps more importantly) to delay agency initiatives, the Office of Management and Budget (OMB) persuaded President Nixon to require EPA, OSHA and several other agencies to send their proposed regulations through an interagency "Quality of Life" review.[3] President Ford followed with Executive Order Number 11821, which for the first time required agencies to prepare a formal analysis, called an Inflation Impact Statement (IIS), of the economic impact of major regulations on regulated industries.[4] President Carter replaced Executive Order 11821 with Executive Order 12044. This new order expanded upon the formal regulatory analysis requirement of Executive Order 11821, and it detailed the role of the Office of Management and Budget and the Council on Wage and Price Stability in the regulatory analysis process.[5] President Reagan, in turn, replaced Executive Order 12044 with Executive Order 12291. The Reagan Executive Order elaborated in more detail on the threshold requirements for EIS preparation, specified a cost-benefit format for the regulatory analysis, and expanded OMB's role in overseeing and monitoring the regulatory impact assessment process.[6]

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[1] 42 U.S.C. §§ 4321 et seq. (1982).

[2] See, F. Anderson, NEPA and the Courts (1973); Anderson, The National Environmental Policy Act, in Federal Environmental Law (E. Dolgin & T. Guilbert eds. 1974); McGarity, The Courts, The Agencies and NEPA Threshold Issues, 55 Tex. L. Rev. 801 (1977).

[3] Memorandum from George P. Schultz, Director of the Office of Management and Budget to Heads of Departments and Agencies, Oct. 5, 1971.

[4] Exec. Order No. 11,821, 3 C.F.R. 926 (1971-75 Comp.).

[5] Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

In addition to these efforts within the executive branch, Congress has during the last seven years actively considered "regulatory reform" legislation that would impose similar regulatory analysis requirements on both executive and independent agencies. Although these efforts have achieved little success, Congress in 1980 enacted the Regulatory Flexibility Act,[7] which directs agencies to analyze the impact of proposed regulations on small businesses, small nonprofit organizations, and small governmental entities.

This chapter of the Report will trace the evolution of the regulatory impact assessment program from its NEPA antecedents to its current implementation under Executive Order Number 12291 and the Regulatory Flexibility Act. In addition to describing the contents of the executive orders, the chapter will also detail the major critical analyses of the evolving process contained in government reports and academic commentaries. The process evolved in response to many of the contemporary criticisms, but, not surprisingly, many of the problems that were identified early in development of the regulatory analysis program still plague agency implementation efforts. These problems and many of the criticisms that have remained largely unaddressed as the program has evolved will be addressed in later chapters of this Report.

I. NEPA Antecedents.

While the National Environmental Policy Act (NEPA) contains many broad statements of federal policy toward the environment,[8] its real bite is in its "action forcing" provision that requires all agencies to

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[6] Exec. Order No. 12,291, 3 D.F.R. 127 (1982).

[7] 5 U.S.C. § 601 et seq. (1982).

[8] A decade after NEPA's enactment, the Supreme Court eliminated any doubt that, except for its EIS requirement, NEPA was basically hortatory in nature. In Strykers Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980), the Court held that NEPA did not empower the courts to hold agencies to NEPA's substantive commands. In the process, however, the Court reaffirmed NEPA's

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> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
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> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[9]

As the courts slowly fleshed out the meaning of the threshold words "major federal action significantly affecting the human environment"[10] and began assessing the quality of agency Environmental Impact Statements,[11] agencies initially reviewed NEPA as a wasteful and unnecessary impediment to the attainment of their programmatic goals[12] and complained of the delay and expense that the EIS process entailed.[13] They

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[8] fundamental procedural command that the agencies prepare environmental impact statements detailing the environmental effects of major federal actions significantly affecting the quality of the human environment.

[9] 42 U.S.C. § 4332(2)(C) (1982).

[10] 42 U.S.C. § 4332(2)(C) (1982). See generally, McGarity, supra note 2; W. Rodgers, Environmental Law §§ 7.6-7.9 (1976).

[11] See, F. Anderson, supra note 2, at 200-223; W. Rodgers, supra note 10, at 792-98.

[12] See, Administration of the National Environmental Policy Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 91st Cong., 2d Sess. 1104-07 (1970)

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[13] See, Andrews, NEPA in Practice: Environmental Policy or Administrative Reform, in Workshop on the National

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urged the courts to erect high thresholds[14] and to exempt various activities from NEPA's substantive and procedural commands.[15] The courts, however, steadfastly adhered to NEPA's procedural requirements, which some courts interpreted to require agencies to adopt a comprehensive analytical rationality approach to all major federal actions that would significantly affect the environment. Agencies soon began to hire employees with expertise in environmental impact assessment and to write those employees into their standard operating procedures. The agencies were assisted in this effort by Guidelines and later by binding Regulations emanating from the Council on Environmental Quality, an agency created by Title II of NEPA to guide the agencies in their attempts to comply with the statute.[16]

In time, the agencies institutionalized the NEPA process, but this in turn generated a new wave of NEPA criticism. Commentators observed that agency compliance with NEPA's procedural requirements did not ensure that the agencies' actions comported with NEPA's substantive goals. They submitted that agencies commonly viewed the NEPA EIS requirement as a necessary procedural evil that they could ignore in the actual decisionmaking process.[17] Indeed,

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[12] (Continued from previous page)
(testimony of Edward Berlin, counsel, Environmental Defense Fund).

[13] (Continued from previous page)
Environmental Policy Act, Serial No. 94-E, 94th Cong., 2d Sess. 21, 31 (1976) [hereinafter cited as Workshop].

[14] See, e.g., St. Joseph Historical Society v. Land Clearance for Redevelopment Authority, 366 F. Supp. 605, 612 (W.D. Mo. 1973).

[15] See, e.g., Green County Planning Bd. v. Federal Power Comm'n, Civ. No. 71-1991 (2d Cir. 1971), Petition of the Federal Power Commission of Rehearing and Suggestion for En Banc Reconsideration thereof, reprinted in Joint Hearings on the National Environmental Policy Act Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 376-79 (1972).

[16] 42 U.S.C. §§ 4231-37 (1982).

[17] See, Cutler, Improving Agency Capacity for Handling Environmental Issues, 4 Envtl. L. Rep. (Envtl. L. Inst.); Crampton & Berg, On Leading a Horse to Water: NEPA and

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cynics suggested that agency staff would often draft lengthy EISs in excruciating detail to ensure that busy decisionmakers would not read them and therefore not be influenced by them.[18] Others argued that the preoccupation of agencies and environmental groups with NEPA's environmental impact assessment requirements diverted attention away from the important goal of broadening the substantive environmental mandates of the agencies.[19]

Some observers contended that the courts were erroneously reading NEPA to impose upon agencies an unreasonable obligation to search out and discuss alternatives to proposed actions.[20] Perhaps the most cogent criticism of the environmental impact assessment process was that it presumed an unrealistic decisionmaking process "characterized by abstract rationality and focused on a single responsible decision-maker who, even if he did exist, could hardly be expected to undertake the investigation of alternatives that the Act requires."[21]

Other commentators were less pessimistic. Pointing to numerous instances in which agency actions were modified or abandoned in light of the environmental analysis contained in an EIS,[22] some observers concluded that the environmental

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[17] the Federal Bureaucracy, 71 Mich. L. Rev. 511, 512, 516 (1973); Strohbehn, Perspective: NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change, 4 Ecology L.Q. 93, 94 (1974) (NEPA viewed "more as an obstacle than an opportunity.").

[18] See, Caldwell, Is NEPA Inherently Self-Defeating? 9 Envtl. L. Rep. (Envtl. L. Inst.), at 50001, 50004 (1979).

[19] See, Fairfax, A Disaster in the Environmental Movement, 199 Science 743 (1978); Note, Implementation of the Environmental Impact Statement, 88 Yale L.J. 596, 599 (1979). ("The assumption that environmental quality could be enhanced simply by increasing information and agency disclosure has proved fallacious.")

[20] See, Caldwell, supra note 18, at 50006; Crampton & Berg, supra note 17, at 531.

[21] Caldwell, supra note 18, at 50003. See also, Sax, The (Unhappy) Truth About NEPA, 26 Okl. L. Rev. 239 (1973). ("I know of no solid evidence to support the belief that

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[22] See, Andrews, supra note 13, at 28; Caldwell, supra note 18, at 50007; Strohbehn, supra note 17, at 94; Comment,

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impact assessment process forced agencies to do a better job of articulating and explaining their decisions.[23] The agencies themselves have often testified to the value of the NEPA-imposed process to well-reasoned agency decisionmaking.[24] All of this has led the academician who, with Senator Jackson, conceived the EIS idea to conclude that the environmental impact assessment process has functioned largely as intended.[25]

II. The Quality of Life Review in the Nixon Administration.

The Office of Management and Budget established the "Quality of Life Review" in 1971 in response to the controversy surrounding EPA's first round of regulations under the Clean Air Act of 1970.[26] The OMB directive required that all

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[21] requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions.")

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[22] The National Environmental Policy Act: How it is Working, How it Should Work, 4 Envtl. L. Rep. (Envtl. L. Inst.), at 10003 (1974) ("It is hard to dismiss as ineffectual that which the Corps of Engineers says caused it to drop 24 projects, temporarily or indefinitely delay 44, and significantly modify 197 more."); Council on Environmental Quality, Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies 2 (1976) [hereinafter cited as Six Years Experience]. ("Environmental assessments and impact statements have substantially improved government

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[23] See, Crampton & Berg, supra note 17, at 515. Crampton and Berg conclude that the NEPA process has produced a

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[24] See, Six Years Experience, supra note 22, at 23 ("with rare exceptions, federal agencies with major EIS

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[25] Caldwell, supra note 18, at 50006. See, Workshop, supra note 13, at App. III.

[26] 42 U.S.C. §§ 7401 et seq. (1982). See, G. Eads & M. Fix, Relief or Reform? Reagan's Regulatory Dilemma 46-50 (1984) [hereinafter cited as G. Eads & M. Fix].

agencies send "proposed . . . regulations, standards, guidelines, and similar materials pertaining to environmental quality, consumer protection, and occupational health and safety" through an interagency review process prior to proposing them and again before their finalization.[27] The relevant health and environmental agencies were required to submit a summary of the proposed regulation, including, among other things, "[a]lternatives to the proposed actions that have been considered [and] a comparison of the costs (Federal and non-Federal) associated with the alternatives considered."[28]

The Quality of Life review process gave affected agencies four weeks to submit comment upon draft and final regulations to the promulgating agency for scrutiny by lower level staff before promulgating final drafts. The directive gave OMB broad discretion to extend the four week comment period,[29] and an extended review could delay the promulgation of a rule for up to two years.[30] According to a report published by a House of Representatives oversight committee, OMB's power to extend the comment period gave it a "de facto" veto power that engendered animosity and resentment between employees of EPA,

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[22] (Continued from previous page) decisions over the past six years, but not as consistently or as well as they should and can.")

[23] (Continued from previous page) "dramatic change in the perspective of a number of federal agencies." Id. at 512.

[24] (Continued from previous page) responsibilities reported that the EIS process is an important aid to planning and decision-making at various levels"); Caldwell, supra note 18, at 50004 n. 26.

[27] "Executive Branch Review of Environmental Regulations," Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. 61 (1979) [hereinafter cited as Executive Branch Review Hearings] (testimony of John Quarles, former Deputy Administrator, Environmental Protection Agency) [hereinafter cited as Quarles testimony].

[28] Federal Regulatory [sic] and Regulatory Reform, H. Doc. No. 134, 94th Cong., 2d Sess. 506 (1976) [hereinafter cited as Moss Committee Report].

[29] Moss Committee Report, supra note 28, at 62.

[30] Moss Committee Report, supra note 28, at 63.

the primary target of the Quality of Life review, and OMB staffers.[31] Moreover, OMB's role created uncertainty in the minds of some regulatees and public interest groups as to which institutions actually controlled EPA decisionmaking.

In addition to the potential of the Quality of Life review to delay the promulgation of regulations, it also presented problems of management and accountability. According to a former Deputy Administrator of EPA, interagency comments were contributing potentially important input into the decisionmaking process off-the-record and without public review.[32] Moreover, since responsibility for the review process in both agencies shifted to subordinate staff levels, it was possible that higher level officials would never become aware of the nature of the interagency compromises that were reached in the drafting of the regulation that they signed.[33]

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[31] Moss Committee Report, supra note 28, at 63. The first major clash between EPA and OMB occurred as EPA struggled to meet a court-ordered deadline for the promulgation of lead phase-down standards. As OMB objected to the stringency of the standards, EPA decisionmakers questioned whether OMB had authority to delay the issuance of a rule and threatened to move forward without OMB approval. The impasse was never reached, however, because EPA and OMB hit upon a compromise within hours of the deadline. Not suprisingly, EPA adopted an OMB revision. See, J. Quarles, Cleaning Up America 138 (1976).

EPA also faced severe criticism and a Senate investigation as a result of OMB's alleged improper influence on the promulgation of Clean Air Act state implementation plan guidelines in 1971. Richard Ayers, then director of a project on clean air sponsored by the Natural Resources Defense Council (NRDC), testified that the final guidelines were substantially weakened after a covert OMB review. Ayers pointed to the significant revisions in the guidelines, all of which "drastically weakened final guidelines. . . ." OMB was accused of adding provisions requiring economic impact and cost-benefit factors in direct conflict with legislative intent. See, J. Quarles, supra, at 81-85.

[32] Executive Branch Review Hearings, supra note 27, at 64 (Quarles testimony).

[33] Executive Branch Review Hearings, supra note 27, at 64; R. Litan and W. Nordhaus, Reforming Federal Regulation 67 (1983).

On the positive side, the Quality of Life review probably forced agencies to undertake more thorough analyses of costs and other non-health and environmental factors.[34] In retrospect, however, it appears that the Quality of Life review was intended more as a vehicle for allowing other governmental agencies (and their constituents in the regulated industries) to have greater private access to EPA and OSHA decisionmakers than as a mechanism for forcing those agencies to bring the discipline of policy analysis to bear on its regulations. Although public interest groups (who were not privy to the interagency interactions) believed that EPA decisionmaking was being heavily influenced by covert outside influence, it appears that the agencies viewed the Quality of Life review process as little more than a politically inspired hurdle to be negotiated and then ignored. This was especially true after Administrator Ruckelshaus secured from President Nixon an agreement that EPA had final authority to issue rules, irrespective of the wishes of OMB and the commenting agencies.[35]

III. The Inflation Impact Statement Program.

Concern for minimizing the detrimental impacts of federal regulation continued into the Ford Administration, but the focus shifted to the impact of all federal regulation on the increasingly significant national issue of inflation. President Ford saw inefficient regulation as one contributor to the inflation problem and he believed that sound regulatory impact analysis would alleviate it. Accordingly, he signed Executive Order 11821, mandating that an "Inflation Impact Statement" (IIS) accompany all "major federal proposals for legislation, rules and regulations" promulgated by executive branch agencies.[36] In an address to a joint session of

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[34] Executive Branch Review Hearings, supra note 27, at 67.

[35] When President Nixon was reelected in 1972, the new Administrator William Ruckelshaus demanded that EPA expressly be given final rulemaking authority. President Nixon acceded to that request, but that promise was not put in writing until Russell Train succeeded Ruckelshaus in 1973. J. Quarles, supra note 31, at 119. Deputy Administrator John Quarles finally took action as Acting Administrator to terminate the Quality of Life Review Program in 1977, following the inauguration of President

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[36] Exec. Order No. 11,821, supra note 4. See, G. Eads & M. Fix, supra note 26, at 50-54.

Congress, President Ford stated that the purpose of the program was "to make decisionmakers more sensitive to the hidden and often excessive cost consequences of prospective government actions."[37] According to an evaluation of the IIS program prepared by the staffs of the Office of Management and Budget (OMB) and the Council on Wage and Price Stability (CWPS), the two agencies charged with overseeing the IIS program, its purpose was as follows:

> [T]he aim is to: (a) make agencies, in their rulemaking processes, and in developing legislative proposals, more accountable for their actions' economic effects; (b) provide a management tool of use primarily to the agency, and secondarily to CWPS/OMB, in considering how the expected costs to society from a proposed action compare with its expected benefits, and how these compare with the costs and benefits of possible alternative government actions; and (c) reduce Federal government-induced inflationary pressures on the economy by getting agencies to make more effective use of economic analysis in their decisionmaking.[38]

The Executive Order gave the Office of Management and Budget (OMB) the duty to promulgate criteria to guide agencies in determining whether a particular proposal was "major" and to prescribe procedures for the evaluation of IISs. OMB, in turn, was given the authority to delegate its duties to other agencies, including the Council on Wage and Price Stability (CWPS).[39] In developing criteria OMB/CWPS were to consider, _inter alia_:

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[35] Carter. Executive Branch Review Hearings, supra note 27, at 66 (Quarles testimony).

[37] President's Address to Joint Session of Congress, 10 Weekly Comp. Pres. Doc. 1239, 1241-42 (Oct. 8, 1974). Exec. Order No. 11,821, supra note 4.

[38] _See_, Staff of the Council on Wage and Price Stability and the Office of Management and Budget, an Evaluation of the Inflation Impact Program 3-4 (1976) [hereinafter cited as IIS Evaluation].

[39] Exec. Order No. 11,821, supra note 4, at §§ 1, (2)(a), 2(b). CWPS was a natural recipient of OMB delegation because it was empowered by statute to review formally agency proposed rules and comment upon them in rulemaking proceedings. _See_, Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974).

(a) cost impact on consumers, businesses, markets, or Federal, State or local government;
(b) effect on productivity of wage earners, businesses or government at any level;
(c) effect on competition;
(d) effect on supplies of important products or services.[40]

Finally, the agencies were ordered, to the extent permitted by law, to cooperate with OMB/CWPS and to furnish them with requested information. However, the agencies were to fulfill their new responsibilities without any additional resources or personnel.[41]

OMB implemented the Executive Order by promulgating Circular Number A-107.[42] This Circular had three primary functions. First, it ordered agencies to submit to OMB criteria for selecting "major" rules.[43] This subdelegation of the authority to define the "threshold" criteria[44] to the agencies reflected OMB's determination that the basic management concept underlying Executive Order 11821 was, "to decentralize to agency heads most responsibility for developing and implementing the IIS program, in order to allow each agency to adopt procedures that would match the nature of its mission and its organization."[45]

A second function of OMB Circular A-107 was to implement OMB's duty to prescribe procedures for IIS evaluation. Once again, OMB left the promulgation of detailed operating procedures to the individual agencies. According to the 1976 staff report, some agencies were more enthusiastic about writing the IIS program into their standard operating procedures than others.[46]

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[40] Exec. Order No. 11,821, supra note 4, at § 3. To these requirements OMB later added: (f) effect on employment; and (g) effect on energy supply or demand. Office of Management and Budget, Circular Number A-107 (January 28, 1975) [hereinafter cited as Circular No. A-107].

[41] Comment, infra note 48, at 1162. Havemann, Agencies Slow in Producing Inflation Impact Statements, 7 Nat'l J. Rep. 892 (June 14, 1975).

[42] Circular No. A-107, supra note 40.

[43] IIS Evaluation, supra note 38, at 8.

[44] IIS Evaluation, supra note 38, at 8. OMB and CWPS disagreed over whether agencies should be allowed to design their own threshold criteria, but OMB prevailed. See, Havemann, supra note 41, at 893.

[45] IIS Evaluation, supra note 38, at 8.

OMB read its authority to prescribe procedures broadly to empower it to specify in broad outline the proper elements of an IIS. The Circular provided that the IIS should include, where applicable:

> (1) an analysis of the principal cost or other inflationary effects of the action on markets, consumers, businesses, etc., and, where practical, an analysis of secondary cost and price effects. These analyses should have as much quantitative precision as necessary and should focus on a time period sufficient to determine economic and inflationary impacts;
> (2) a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts. These benefits should be quantified to the extent practical; and
> (3) a review of alternatives to the proposed action that were considered, their probable costs, benefits, risks, and inflationary impacts compared with those of the proposed action.[47]

The quoted criteria reflected OMB's determination that the inflationary impact of a proposed rule could best be ascertained by comparing the proposals' costs and benefits in light of the costs and benefits of the alternatives.[48] The stated preference was for a quantitative cost-benefit analysis of the proposal and its alternatives. OMB further felt that cost-benefit analysis could also be useful in assessing the impact of a regulation on productivity.[49]

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[46] IIS Evaluation, supra note 38, at 9.

[47] Circular No.A-107, supra note 40, at 4(b). OMB's authority to specify the contents of an IIS is not readily apparent from the text of Executive Order 11821. The content of the IIS would appear to be more a matter of substance than procedure. The executive agencies apparently did not object to the Circular on this ground.

[48] See, IIS Evaluation, supra note 38, at ii, 5; Comment, The Inflation Impact Statement Program: An Assessment of the First Two Years, 26 Am. U.L. Rev. 1138, 1143 (1977); Study on Federal Regulation, Vol. 6, Sen. Doc. No. 13, 96th Cong., 1st Sess. 78-79 (1978) [hereinafter cited as Senate Study on Federal Regulation].

[49] See, Comment, supra note 48, at 1143.

A final function of OMB Circular A-107 was to provide a procedure for granting exemptions. The Circular allowed agencies that did not promulgate major rules to become exempt from the procedural requirements of the IIS program.[50] This provision was apparently implemented without controversy, and twenty-eight agencies were granted exemptions.[51]

In managing the IIS program, OMB assumed primary responsibility for monitoring IISs for proposals for legislation. OMB delegated primary responsibility for monitoring proposed rules and regulations to CWPS.[52] CWPS also implemented its independent statutory responsibility to comment on agency rules and regulations in public rulemaking hearings by analyzing agency IISs in numerous rulemaking proceedings.[53] During the two-year period between the IIS program's inception and its December, 1976 evaluation, CWPS had commented on 23 of 41 IISs on regulations. Eleven of these comments were made on the public record; the other twelve were made privately by interagency memoranda.[54]

Neither CWPS nor OMB, however, had any authority to change regulatory decisions or to delay their implementation.[55] With respect to agency rules and regulations, OMB and CWPS played purely advisory roles. The Executive Order and the OMB Circular were silent on the question of whether an agency's failure to prepare an IIS was subject to judicial review. In the only case to raise this issue, however, the Eighth Circuit Court of Appeals held that judicial review of an agency's threshold decision was inappropriate.[56]

Executive Order 11821 by its terms was only applicable to "executive branch agencies." Most of the independent agencies took the position that compliance with the IIS program would be inconsistent with their independent status, citing Humphrey's Executor v. United States.[57] Rather than face a complicated judicial challenge to the Executive Order, OMB and CWPS acquiesced in the independent agencies' refusal to become a part of the IIS program.[58]

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[50] IIS Evaluation, supra note 38, at 8.

[51] IIS Evaluation, supra note 38, at 12, Table 3.

[52] IIS Evaluation, supra note 38, at 17.

[53] IIS Evaluation, supra note 38, at 17.

[54] IIS Evaluation, supra note 38, at 33.

[55] IIS Evaluation, supra note 38, at 18. Havemann, supra note 41, at 892. (Quoting OMB Associate Director Calvin Collier to the effect that "OMB does not intend to use inflation impact statements as a lever to force agencies to change their proposals for legislation and regulations.")

[56] Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975).

The IIS program received little attention from outside commentators.[59] The most comprehensive critique of the program was self-evaluation written by the combined staffs of OMB and CWPS for the purpose of advising President Ford on whether the program should be extended beyond its December 31, 1976 expiration date. Given the source of the report, it is not surprising that its authors concluded that the program should be continued (with a change of name to "Economic Impact Statement" program) and even strengthened to give CWPS and OMB power to reject agency threshold determinations and to require agencies to revise inadequate IISs.[60]

Commentators referred to a wide variance in the quality of IISs.[61] Several particular complaints emerged, including the failure to identify and consider alternatives adequately,[62] poor analysis of the benefits of proposed regulations,[63] and overemphasis on quantitative cost-benefit analysis.[64] OMB and CWPS were asked to provide more structured guidelines for agency preparation of IISs.[65] One observer summarized these criticisms with the general complaint that too many IISs were "unduly brief, failed to address the relevant issues, and contain[ed] grossly defective analyses."[66]

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[57] 295 U.S. 602 (1935).

[58] Comment, supra note 48, at 1152. See also, Miller, Lessons of the Economic Impact Statement Program, 14, 16 Reg. (July/August 1977).

[59] The author has located only two contemporaneous outside commentaries in the legal and policy analysis literature that focus primarily on the IIS program. Miller, supra note 58, at 14; Comment, supra note 48. The former contains little more than a recapitulation of the critique of the staffs of OMB and CWPS. IIS Evaluation, supra note 38.

[60] IIS Evaluation, supra note 38, at 81.

[61] See, United States Regulatory Council, A Survey of Ten Agencies' Experience with Regulatory Analysis 1 (1981) [hereinafter cited as Regulatory Council Survey].

[62] IIS Evaluation, supra note 38, at 33. ("Analysis of alternatives usually is quite skimpy and often not even attempted.")

[63] IIS Evaluation, supra note 38, at iii.

[64] Comment, supra note 48, at 1143-39, 1164.

Perhaps the most abundant criticism of the IIS program concerned its perceived failure to affect the outcome of agency decisions.[67] Critics believed that agencies often viewed the program as an unavoidable paperwork hurdle to be negotiated rather than incorporated into the decisionmaking process.[68] In the minds of some observers, too many IISs were prepared after the fact as post hoc justifications for decisions previously reached without the benefit of regulatory analysis.[69] This was attributed to the varying commitment of the agencies to the IIS process.[70] The Staff Report concluded that the program had had a large impact on the Department of Transportation[71] and the Environmental

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[65] Comment, supra note 48, at 1157.

[66] Miller, supra note 58, at 16.

[67] See, IIS Evaluation, supra note 38, at iii.

[68]
> To the extent that the analysis is performed outside the office which develops the proposal (which is especially likely where an office has very limited analytical capabilities), the analysis is not apt to be an important input in the proposal's development. Furthermore, much of the work on an IIS is completed just prior to the proposals publication, which limits the effect of the analysis in molding the initial proposal.

IIS Evaluation, supra note 38, at iii. See also, IIS Evaluation, supra note 38, at 38, 41; Miller, supra note 58, at 18. ("[T]he decision-making process often proceeds along two, almost distinct tracks -- one for the decision-makers and one for the analysts.")

[69] See, IIS Evaluation, supra note 38, at 59; Miller, supra note 58, at 18.

[70]
> Agencies have often lacked the resources and/or the will to see that: (a) such an analysis was performed, (b) it was performed before making

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[71] IIS Evaluation, supra note 38, at vii. ("The combined DOT internal and IIS requirements do seem to be affecting

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Protection Agency,[72] a small impact on the Department of Labor,[73] and almost no impact at all on USDA.[74] The Staff Report concluded that the IIS was "not apt to be an important input in [a] proposal's development."[75]

The Staff Report acknowledged that some of the failure of the IIS program was due to CWPS's failure to communicate realistic suggestions to the agencies in a way that could generate useful responses. The antagonistic relationships that often developed between CWPS and the agencies discouraged meaningful dialogue.[76] Another suggestion for the agencies' unenthusiastic response to the program was OMB's failure to request additional appropriations to carry out the program's additional responsibilities.[77] Many of the program's inadequacies were attributed to the failure of an effective enforcement mechanism.[78] The Staff Report suggested that OMB assume the authority to direct agencies to revise inadequate IISs and to prepare IISs when CWPS disagreed with their threshold determinations.[79]

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[70] (Continued from previous page)
regulatory decisions, and (c) it was taken seriously as an important input in the decisionmaking process.

IIS Evaluation, supra note 38, at 29. See also, Miller, supra note 58, at 18.

[71] (Continued from previous page)
decision as intended, although resulting in some significant regulatory delays.")

[72] IIS Evaluation, supra note 38, at vi. (IIS Program has "succeeded in getting decision-makers to be more sensitive to economic analysis.")

[73] IIS Evaluation, supra note 38, at vii. (IIS program "has had little if any impact on decision-making. . . .")

[74] IIS Evaluation, supra note 38, at v. ("IISs from USDA are mainly repackaged analyses.")

[75] IIS Evaluation, supra note 38, at 41.

[76] IIS Evaluation, supra note 38, at v.

[77] See, Comment, supra note 48, at 1162.

[78] See, IIS Evaluation, supra note 38, at iv-v; Miller, supra note 58, at 19.

[79] IIS Evaluation, supra note 38, at 81.

Despite these reported failures, the commentators agreed that the program had had some positive effects on agency decisionmaking, especially insofar as it added to the agencies' analytical capabilities.[80] Moreover, the program, in the minds of some, had a positive impact on public participation in the rulemaking process, because it gave regulatees ammunition to attack rulemaking proposals.[81] On balance, the commentators, both inside and outside of government, concluded that the program was worth pursuing. President Ford renamed it the "Economic Impact Assessment" program and extended it for another year.[82]

IV. The Carter Administration Regulatory Analysis Program.

Although President Carter allowed the Ford Administration's IIS program to remain in effect throughout 1977, he expanded upon the program and changed its direction somewhat in Executive Order 12044.[83] The avowed purpose of the Executive Order was to make regulations as simple and clear as possible, to achieve legislative goals effectively and efficiently, and to avoid imposing "unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments."[84] In a separate statement on the Executive Order, President Carter declared that the purpose of the regulatory analysis requirement was to "ensure that Federal regulations are cost-effective and impose minimum economic burdens on the private sector."[85]

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[80] See, IIS Evaluation, supra note 38, at 40; Miller, supra note 58, at 18; Comment, supra note 48, at 1161-62.

[81] IIS Evaluation, supra note 38, at iii; DeMuth, The White House Review Programs, Regulation, Jan./Feb. 1980, at 13, 18 [hereinafter cited as DeMuth]; Miller, supra note 58, at 18; Viscusi, Presidential Oversight: Controlling the Regulators, 2 J. Pol'y Analysis & Mgmt. 157, 163 (1983).

[82] Exec. Order No. 11,949, 3 C.F.R. 161 (1977).

[83] Improving Government Regulations: Executive Order 12,044, 14 Weekly Comp. Pres. Doc. 558 (Mar. 23, 1978). See, G. Eads & M. Fix, supra note 26, at 54-65.

[84] Exec. Order No. 12,044, supra note 5, at § 1.

[85] Improving Government Regulation, Statement on Executive Order 12044, 14 Weekly Comp. Pres. Doc. 561, 562 (Mar. 23, 1978).

To achieve these goals, regulations were to be developed through a process that insured that:

(1) the need for and purposes of the regulation are clearly established;
(2) heads of agencies and policy officials exercise effective oversight;
(3) the opportunity exists for early public participation and comment;
(4) meaningful alternatives are considered and analyzed before the regulation is issued; and
(5) compliance costs, paperwork, and other burdens on the public are minimized.[86]

Executive Order 12044 broke regulations down into three broad categories. A "significant" regulation had to be included on the newly established "Semi-Annual Agenda of Regulations," which would describe the regulation, detail the need for the regulation and its legal basis, and set forth the status of all significant regulations.[87] A significant regulation could not be developed without a sign-off by the head of the agency after he or she had reviewed the relevant issues, explored alternative approaches, established a tentative plan for obtaining public participation, and set target dates for completing the various steps in the regulation's evolution.[88] The executive order required that the public comment period on significant regulations not be less than 60 days.[89] Prior to publishing a proposal for a significant regulation in the Federal Register, the agency head (or designated official with statutory responsibility) was required to make eight specific findings concerning the need for the rule, the burdens it would impose, and the absence of less burdensome alternatives.[90] No special procedures were

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[86] Exec. Order No. 12,044, supra note 5, at § 1.

[87] Exec. Order No. 12,044, supra note 5, at § 2(a).

[88] Exec. Order No. 12,044, supra note 5, at § 2(b).

[89] Exec. Order No. 12,044, supra note 5, at § 2(c).

[90] The agency head was required to make the following findings:

(1) the proposed regulation is needed;
(2) the direct and indirect effects of the regulation have been considered;
(3) alternatives have been considered and the least

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required for "insignificant" rules, although the Executive Order's injunction that the public be given "an early and meaningful opportunity to participate in the development of agency regulations" applied to all rules.[91]

The Executive Order further subdivided the "significant" rules category into rules (hereinafter called "major significant" rules) requiring a "Regulatory Analysis" (RA) and those not requiring such an analysis (hereinafter called "nonmajor significant" rules). For each major significant rule the agency had to prepare a Preliminary Regulatory Analysis prior to publishing the proposed rule and a Final Regulatory Analysis to accompany the final rule. The RA for a major significant rule was to contain "a careful examination of alternative approaches. . . ."[92] In addition, each RA was to contain:

> [a] a succinct statement of the problem;
> [b] a description of the major alternative ways of dealing with the problem that were considered by the agency;
> [c] an analysis of the economic consequences of each of these alternatives and a detailed explanation for choosing one alternative over the others.[93]

Like the IIS, the RA was to describe and discuss alternatives to the agency's proposal and the economic

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[90] burdensome adopted;
(4) public comments were considered and responded to;
(5) the regulation was written in plain English and was understandable;
(6) estimates were made of the reporting burdens or recordkeeping requirements necessary for compliance with the new regulation;
(7) responsible person was identified;
(8) a plan was included to evaluate the regulation after issuance.
Exec. Order No. 12,044, supra note 5, at § 2(d).

[91] Exec. Order No. 12,044, supra note 5, at § 2(c).

[92] Exec. Order No. 12,044, supra note 5, at § 3.

[93] The CWPS regulatory interventions are summarized in T. Hopkins, T. Lenard, J. Morrall & E. Pinkston, A Review of the Regulatory Interventions of the Council on Wage and Price Stability 1974-1980 (1981) [hereinafter cited as CWPS Review].

consequences of the alternatives. However, unlike the CWPS criteria for an IIS, Executive Order 12044 did not explicitly require that the RA examine "secondary cost and price effects;" nor did it require an explicit cost-benefit analysis. The RA was apparently meant more to force the agency to explain why it adopted the approach that it did rather than to require the agency to bring a particular form of analysis to bear on the regulatory problem. CWPS, however, retained its role as critical analyst and commentator. In addition, President Carter created the Regulatory Analysis Review Group (RARG), composed of fifteen agencies (including CWPS) and chaired by the Council of Economic Advisors, to review executive agency RAs and comment through CWPS in agency proceedings.[94]

Unlike Executive Order 11821, Executive Order 12044 explicitly exempted certain agencies and agency functions. It was specifically made inapplicable to independent agencies and to formal rulemaking proceedings in any agency.[95] Its terms did not apply to military and foreign affairs functions, management and personnel matters, and government procurement.[96] Finally, it was not inapplicable to regulations issued in response to emergencies and those governed by short-term statutory or judicial deadlines so long as the agency published a statement describing why preparing an RA for one of these rules was "impracticable or contrary to the public interest."[97]

As it applied to new regulations, Executive Order 12044 did not depart dramatically from the program that evolved under Executive Order 11821.[98] While the RA requirement lacked the

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> As distinct from a [CWPS] filing, a RARG report essentially is a consensus document that brings the views of the same fifteen RARG member agencies to bear on a draft prepared by staff drawn from CEA as well as from the [CWPS].

CWPS Review, supra note 93, at 7. See also, Senate Study on Federal Regulation, supra note 48, at 82-83.

[95] Exec. Order No. 12,044, supra note 5, at § 6(b)(1) & (5). At least one agency (the Interstate Commerce Commission)

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[96] Exec. Order No. 12,044, supra note 5, at § 6(b)(2), (3), & (4).

[97] Exec. Order No. 12,044, supra note 5, at § 6(b)(6).

[98] One important difference between Executive Order 11821 and Executive Order 12044 was the provision in the latter

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IIS program's emphasis on quantitative cost-benefit analysis, the Carter administration did not retreat from the basic analytical thrust of the Ford administration program. Both reflected a concern that agencies consider alternatives and explain their choices in full public view.[99]

The process that Executive Order 12044 inaugurated was carefully scrutinized in Congress and the media, but the vast bulk of this attention focused upon the review function performed by OMB, CWPS, RARG, and the White House.[100] Little

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[95] neverthe less established a "policy review office" in response to Executive Order 12044. Hearings on the Regulatory Procedures Act of 1981 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 211 (1981).

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[98] that agencies examine and analyze existing rules as well as new rules. Exec. Order No. 12,044 supra note 5, at § 4.

[99] CWPS Review, supra note 93, at iii. The Senate Study on Federal Regulation concluded that the differences between the two executive orders was significant in several regards.

> The new Executive Order is far more systematic than its predecessor: timetables are established, and general standards set; opportunity for public comment is guaranteed; and both criteria and procedures, set by Executive Branch agencies, must be approved by the Office of Management and Budget. Moreover, President Carter's program states the general requirement in broader terms, thus allowing for consideration of various kinds of impact not necessarily reducible to dollar and cent values. In express terms, OMB has overall responsibility for the program. In addition, prior to final issuance, agency appraisals are selectively evaluated by the Regulatory Analysis Review Group, headed by the Council of Economic Advisers with analytical staff support provided by the Council on Wage and Price Stability.

Senate Study on Federal Regulation, supra note 48, at 80.

[100] See, e.g., R. Litan and W. Nordhaus, supra note 33, at 68-76; Verkuil, Jawboning Administrative Agencies: Ex

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attention was directed to agency implementation of the RA threshold criteria, the quality of RAs, and the impact of the regulatory analysis on the decisionmaking process. Two reports prepared by the (now-defunct) CWPS[101] and the (likewise defunct) Regulatory Council[102] devoted significant attention to these latter three aspects of the RA program.

Both reports agreed that agencies had given insufficient consideration to available alternatives.[103] The Regulatory Council Report suggested that this might have been due in part to the impossibility of acquiring adequate information on every conceivable alternative to a proposed regulation.[104] Still, some agencies seemed to be preparing RAs as post hoc

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[100] Parte Contracts by the White House, 80 Colum. L. Rev. 943, 944-52 (1980); Hearings on Regulatory Reform Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess., pt. 2, 419 (1979) (testimony of Mr. Alan Morrison, Public Citizens Litigation Group); Hearings on Amendments to the Council on Wage and Price Stability Act Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 196-208 (1977) (testimony of Mr. Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO); Hearings on Executive Branch Review of Environmental Regulations Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. (1979); Tolchin, Presidential Power and the Politics of RARG, Regulation, July/August 1979, at 44.

[101] The CWPS Report consisted of a review of six year's worth of CWPS interventions into agency rulemakings. CWPS Review, supra note 93.

[102] The Regulatory Council Report examined RAs prepared by ten regulatory agencies (including RA equivalents prepared by three independent agencies), evaluated the quality of the of the RAs, and identified changes in the process to enhance its efficacy. Regulatory Council Survey, supra note 61.

[103] CWPS Review, supra note 93, at iii; Regulatory Council Survey, supra note 61, at 17.

[104] Regulatory Council Survey, supra note 61, at 17. The Regulatory Council suggested a "phased" approach to considering alternatives to alleviate this problem. As marginal alternatives are rejected, the analysis of the remaining alternatives should get more sophisticated.

justifications for decisions previously reached on other grounds.[105] On the other hand, many agency analysts stated that the requirement that the RA analyze alternatives had had a positive impact on actual decisions.[106]

The CWPS Report pointed out that many of the CWPS and RARG interventions had criticized the agencies' failure to quantify the benefits of regulations adequately.[107] This was viewed as part of a more general problem that the agencies did not make sufficient use of cost-benefit analysis.[108] Pointing out that the Executive Order did not strictly require benefit analysis,[109] the Regulatory Council Report complimented the agencies for their efforts to quantify the risks that their regulations were addressing.[110] The Regulatory Council suggested that numerous theoretical and practical problems plagued attempts to reduce benefits to dollar values, including the inadequacy of existing data to support precise risk estimates, and the problem of reducing health and aesthetic values to monetary units.[111] The report warned that quantification is sometimes pursued at the expense of broader social issues.[112] The Regulatory Council Report, however, did not dispute CWPS criticism that agencies often gave insufficient attention to cost-effectiveness analysis.[113]

The agencies' analysis of the costs of their regulations also received some criticism. Acknowledging that agencies had by and large done a good job of calculating the direct costs of regulation, the CWPS Report noted an excessive attention to compliance costs to the exclusion of broader social costs.[114] The Regulatory Council Report likewise noted wide variety among the agencies in the kinds of costs that were considered in RAs, and suggested that the variety might be attributable to differences in language of the enabling statutes.[115] The Regulatory Council further commented that the uneven quality of cost analysis might be attributable to the fact that many agencies do not have sufficient authority to gather accurate data on their own, and are forced to rely upon possibly biased information from the regulated industries.[116] On the other hand, the report recognized that the agencies tended to bias cost estimates downward[117] and to ignore indirect costs.[118]

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[105] Regulatory Council Survey, supra note 61, at 17.

[106] Regulatory Council Survey, supra note 61, at 18.

[107] CWPS Review, supra note 93, at iii.

[108] CWPS Review, supra note 93, at 25. See also, DeMuth, supra note 81, at 16.

[109] Regulatory Council Survey, supra note 61, at 26.

[110] Regulatory Council Survey, supra note 61, at 14.

[111] Regulatory Council Survey, supra note 61, at 27, 31.

[112] Regulatory Council Survey, supra note 61, at 47.

[113] CWPS Review, supra note 93, at iv.

[114] CWPS Review, supra note 93, at iii.

V. The Reagan Administration Regulatory Impact Assessment Program.

Within a month after assuming office, President Reagan rescinded the Carter executive order and replaced it with Executive Order 12291, which mandated an even more comprehensive program of regulatory analysis.[119] The purpose of the new executive order was

> to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations. . . .[120]

Unlike its predecessors, Executive Order 12291 was intended to impose substantive restrictions on agency rulemaking as well as procedural regulatory analysis requirements. Specifically, regulations were, "to the extent permitted by law," to adhere to the following requirements:

> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences

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[115] Regulatory Council Survey, supra note 61, at 19.

[116] Regulatory Council Survey, supra note 61, at 21.

[117] Regulatory Council Survey, supra note 61, at 23.

[118] Regulatory Council Survey, supra note 61, at 24. See, DeMuth, supra note 81, at 23.

[119] Exec. Order No. 12,291, supra note 6. See, G. Eads & M. Fix, supra note 26, at ch.6.

[120] Exec. Order No. 12,291, supra note 6.

of proposed government action;
(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
(c) Regulatory objectives shall be chosen to maximize the net benefits to society;
(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and
(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.[121]

Regulatory analysis was intended to be a tool for implementing these substantive changes in future rules.[122] The analytical tool was renamed "Regulatory Impact Analysis" (RIA).

Under Executive Order 12291, an agency must prepare a Preliminary Regulatory Impact Analysis (PRIA) for proposed "major" rules and a Final Regulatory Impact Analysis (FRIA) for final rules.[123] The RIA must contain:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the

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[121] Exec. Order No. 12,291, supra note 6, at § 2.

[122] Exec. Order No. 12,291, supra note 6, at § 3(a).

[123] Exec. Order No. 12,291, supra note 6, at § 3(c)(2).

> requirements set forth in Section 2 [quoted above] of this Order.[124]

Like the Carter Administration RA, the Reagan Administration RIA requires an analysis of alternatives, but the RIA more closely resembles the Ford Administration IIS in its specification of cost-benefit analysis as the preferred form of policy analysis. Executive Order 12291 explicitly requires benefit analysis, but it recognizes that not all benefits can be quantified in monetary terms. In addition, the Executive Order adds new requirements that the agency identify the beneficiaries and losers of the regulation. If the agency is unable to reach the executive order's substantive goal of achieving cost-beneficial regulatory results (for example, if its statute dictates a different result), the RIA must explain why it could not do so. This marks a major institutional departure from the Carter Administration program under which the burden was on the CWPS or RARG to demonstrate that a regulation was not cost-effective.[125]

The threshold definition of "major" rule parallels the definition of "major significant" rule in Executive Order 12044. A "major rule" is any regulation that is likely to result in:

> (1) An annual effect on the economy of $100 million or more;
> (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or expert markets.[126]

The agency must prepare a "brief statement" in the preamble to any proposed rule setting forth its reasons for determining that the rule is or is not "major."[127] Section (3) of the definition is new and raises for the first time a concern for productivity, innovation, and international competitiveness.

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[124] Exec. Order No. 12,291, supra note 6, at § 3(d).

[125] See, Eads, Harnessing Regulations: The Evolving Role of White House Oversight, 19, 20 Regulation (May/June 1981); Viscusi, supra note 81, at 161-62.

[126] Exec. Order No. 12,291, supra note 6, at § 1(b).

[127] Exec. Order No. 12,291, supra note 6, at § 3(g).

Another more drastic change is the power afforded OMB, in its complete discretion, to designate any rule as "major."[128]

In addition to its power to designate rules as "major," OMB is also given the authority to waive the RIA requirements for any major rule.[129] That agency is also given a general oversight role. OMB is required to prescribe detailed threshold criteria,[130] and it may review the content of RIAs for adequacy.[131] An agency may not go forward with a proposed or final rule until disputes with OMB are resolved.[132]

Like Executive Order 12044, the Reagan Administration executive order provides for a regulatory agenda and for review of existing regulations.[133] Similarly, Executive Order 12291 provides for exemptions for formal rulemaking,[134] military and foreign affairs functions,[135] rules related to personnel and management,[136] emergency rules,[137] and cases where compliance with the RIA would conflict with a statutory or court-ordered deadline.[138] OMB is given authority to exempt any class or category of regulations from the provisions of the executive order.[139] Independent agencies are exempted.[140]

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[128] Exec. Order No. 12,291, supra note 6, at § 3(b). See, Eads, supra note 125, at 20.

[129] Exec. Order No. 12,291, supra note 6, at § 6(a)(4).

[130] Exec. Order No. 12,291, supra note 6, at §§ 3(b), 6(a)(2).

[131] Exec. Order No. 12,291, supra note 6, at § 3(e).

[132] Exec. Order No. 12,291, supra note 6, at § 3(f).

[133] Exec. Order No. 12,291, supra note 6, at §§ 5, 7.

[134] Exec. Order No. 12,291, supra note 6, at § 1(a)(1).

[135] Exec. Order No. 12,291, supra note 6, at § 1(a) (2).

[136] Exec. Order No. 12,291, supra note 6, at § 1(a)(3).

[137] Exec. Order No. 12,291, supra note 6, at § 8(a)(1).

[138] Exec. Order No. 12,291, supra note 6, at § 8(a)(2).

[139] Exec. Order No. 12,291, supra note 6, at § 8(b).

[140] Exec. Order No. 12,291, supra note 8, at § 1(d). However, Vice President Bush requested the independent

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Unlike the previous executive orders, Executive Order 12291 explicitly addresses the subject of judicial review, stating that the order was not intended to create any additional right to judicial review.[141]

Soon after President Reagan promulgated Executive Order 12291, OMB issued a memorandum entitled "Interim Regulatory Impact Analysis Guidance"[142] to guide the agencies in RIA preparation. The Interim Guidance devotes itself exclusively to the content of the RIA. Working on the assumption that the unimpeded market is the norm, they are strongly oriented toward economic analysis. The Interim Guidelines caution that regulatory programs rarely perform perfectly and suggest that the analysis compare the presently existing imperfect market with an imperfectly functioning regulatory program.

The Interim Guidelines also devote some attention to the agency's consideration of alternatives in RIAs.[143] They explicitly require an agency to consider alternatives that are beyond its statutory authority.[144] Agencies are also required to consider alternative levels of stringency, alternative effective dates, alternative methods of assuring compliance, and alternative market-oriented regulatory approaches.[145]

Finally, the Interim Guidelines elaborate upon the cost-benefit analysis that the executive order requires. They express a strong preference for quantification and monetization, and they suggest a discount rate of ten percent for long-range effects. The Guidelines require that the agency subtract the monetary social cost from the monetary social benefit of the regulation and its alternatives to obtain the monetary net benefit, which might be negative. Only after this is accomplished should nonmonetary considerations be listed. When many of the benefits are not easily quantified the

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[140] (Continued from previous page) agencies to cooperate with the spirit of the executive order. Regulatory Council Survey, supra note 61, at 7n. *.

[141] Regulatory Council Survey, supra note 61, at 9.

[142] Office of Management and Budget, Interim Regulatory Impact Assessment Guidance, July 12, 1981 [hereinafter cited as Interim RIA guidance]. Final Guidelines have not been issued.

[143] Interim RIA Guidance, supra note 142, at 2.

[144] Interim RIA Guidance, supra note 142, at 2.

[145] Interim RIA Guidance, supra note 142, at 2-3.

agencies must analyze the cost effectiveness of the proposal and its alternatives. Where uncertainties plague the cost and benefit estimations the agencies are to use the most likely assumptions in quantitative modeling, but reasonable alternative assumptions should also be examined to test the sensitivity of the results to changes in assumptions.[146]

OMB quickly began to exercise its review authority. During 1981, ninety-five regulations were either withdrawn by agencies or returned by OMB for reconsideration because of OMB's questions concerning their consistency with Executive Order 12291.[147] This amounted to approximately three percent of all of the major and minor rules promulgated during 1981.[148] In 1982, eighty-seven (again approximately three percent) regulations were returned to or withdrawn by the agencies.[149] OMB was also active in granting waivers and exemptions. The agency waived the RIA requirement for one-half of all the major rules in 1981 and 1982.[150] During 1981 and 1982 OMB granted a total of twenty-five general exemptions for classes of regulations to eight agencies.[151]

As with Executive Order 12044, there have been few analyses of the RIA program in operation; public attention has focused primarily upon OMB's role in the process. In addition to a few studies that are just making their way into the literature,[152] the General Accounting Office in November,

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[146] Interim RIA Guidance, supra note 142, at 3-4.

[147] Office of Management and Budget, Executive Order 12291 on Federal Regulation: Progress During 1981 11 (1982) [hereinafter cited as 1981 OMB Report].

[148] 1981 OMB Report, supra note 147.

[149] Office of Management and Budget, Executive Order 12291 on Federal Regulation: Progress During 1982 9 (1983) [hereinafter cited as 1982 OMB Report].

[150] 1981 OMB Report, supra note 147, at 28. The 1982 OMB Report did not detail the number of waivers granted by OMB, but the 1982 OMB Report states that OMB waived the RIA requirement for 21 of 43 major rules in 1982.

[151] 1982 OMB Report, supra note 149, at 27.

[152] Several studies of the OMB oversight process were commissioned for a Conference on the Implications of Executive Order 12291 for Environmental Policy, held at Chapel Hill, North Carolina on October 11-12, 1982. See, Crandall, The Political Economy of Clean Air: Practical

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1982 prepared a comprehensive report on the regulatory analysis programs of the Carter and Reagan administrations.[153] The report was based upon interviews with officials at eleven agencies and OMB and GAO staff evaluations of 57 regulatory analyses, including 38 RAs and 19 RIAs. OMB has, in addition, published two annual reports on the operation of Executive Order 12291.[154]

Agency implementation of the threshold requirements drew four major criticisms. First, academic observers detected an undue concentration on the $100 million threshold criteria to the exclusion of the other nonmonetary criteria that the Reagan executive order added.[155] They pointed out that regulations with less than a large nationwide impact could have a very intense effect on individual firms or industrial sectors.[156] Second, both the GAO and academic observers complained of OMB's failure to explain why it waived the RIA requirement for so many rules.[157] The GAO reported that

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[152] (Continued from previous page) Constraints to the Operation of White House Review; Fisher, An Overview and Evaluation of EPA's Guidelines for Conducting Regulatory Impact Analysis; Freeman, On the Tactics of Benefit Estimation Under Executive Order 12291; Grubb, Whittington & Humphries, The Ambiguities of Cost-Benefit Analysis: An Evaluation of Regulatory Impact Analysis Under Executive Order 12291; Portney, The Benefits and Costs of Regulatory Analysis; Runge, Risk Assessment and Environmental Policymaking Under Executive Order 12291. In addition, Professor Viscusi has published an evaluation of the RIA Program based in part upon his experience as an outside consultant in resolving a dispute between OSHA and OMB concerning OSHA's Hazard Identification Regulations. Viscusi, supra note 81, at 157. See also, G. Eads & M. Fix, supra note 26, ch.6.

[153] United States General Accounting Office, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis Is to Help Control Costs of Regulations (1982) [hereinafter cited at 1982 GAO Report].

[154] 1982 OMB Report, supra note 149; 1981 OMB Report, supra note 147.

[155] Grubb, Whittington & Humphries, supra note 152, at 19.

[156] 1982 GAO Report, supra note 153, at 20.

[157] 1982 GAO Report, supra note 153, at 4. Grubb, Whittington & Humphries, supra note 152, at 18.

> The rationales for these waivers was often unclear, with the agency giving one reason and OMB a different reason, or no reason at all. Even where a reason was given (such as sufficient analysis already having been completed), no support was given for this reason (such as a discussion of, or even a citation to, this analysis).[158]

Finally, OMB and the agencies were criticized for failing to prepare RIAs for "deregulatory" activities,[159] a posture that subjected the RIA program to the charge of having a pro-industry bias.[160]

The content of the RIAs received the now familiar criticisms that they were of widely varying quality[161] and failed adequately to identify and explore alternatives.[162] In addition, the GAO's examination of a large number of RAs and RIAs revealed an observable tendency to provide inadequate support for conclusions and a failure to delimit uncertainties with margins of error.[163] Other commentators observed that RIAs in the Reagan administration tended to focus too narrowly on cost-benefit analysis to the exclusion of other valid policy analytical techniques.[164] This criticism, of course, was addressed more to Executive Order 12291, which required the use of cost-benefit analysis, than to the drafters of the RIAs. But the critics went on to accuse some RIA drafters of "obvious ideological biases."[165]

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[158] 1982 GAO Report, supra note 153, at 4.

[159] 1982 GAO Report, supra note 153, at 3; Eads, supra note 125, at 23-24.

[160] Eads, supra note 125, at 24.

[161] Grubb, Whittington & Humphries, supra note 152, at 24.

[162] 1982 GAO Report, supra note 153, at 3.

[163] 1982 GAO Report, supra note 153, at 3.

[164] Grubb, Whittington & Humphries, supra note 152, at 15. Eads, supra note 125, at 23. ("Considering the state of the art in estimating both benefits and costs, the [cost-benefit analysis] requirement amounts to an invitation to fraud.")

[165]

> While there have been some analyses that appear to have modified political positions, many others show obvious ideological biases. While some have struggled adequately with the familiar problems of

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For the first time, systematic efforts were made to calculate the cost of regulatory analysis and to determine whether the RIA process itself could pass a cost-benefit test. The GAO determined that an average RIA costs approximately $212,000, although the amount varies considerably across agencies.[166] Still, one detailed attempt to compare the costs of RIA preparation with its benefits concluded that the program was probably well worth its cost.[167] The GAO, however, expressed concern that the program was getting short-changed by the failure of OMB and Congress to ask for greater funding for RIA preparation and to provide those funds.[168]

VI. The Regulatory Flexibility Act.

The Regulatory Flexibility Act of 1980 (RFA)[169] is the only instance in which Congress has required all agencies to engage in systematic regulatory analysis.[170] It is, however, limited to regulations that affect small businesses,[171]

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[165] (Continued from previous page)

> quantifying benefits and costs, others -- especially in the environmental area -- have failed completely, just as critics of cost-benefit analysis have claimed they would.

Grubb, Whittington & Humphries, supra note 152, at 2. See also, Eads, supra note 125, at 19.

[166] 1982 GAO Report, supra note 153, at App. II 17-23.

[167] Portney, supra note 152.

[168] 1982 GAO Report, supra note 153, at 6. Professor Eads has gone further to suggest that budget cuts and personnel actions during the Reagan administration caused a number of good policy analysts in the agencies to return to the private sector. Eads, supra note 125, at 23.

[169] 5 U.S.C. § 601 et seq. (1982).

[170] The Regulatory Flexibility Act applies to independent agencies as well as other executive agencies, 5 U.S.C. §

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[171] "Small businesses" for purposes of the Regulatory Flexibility Act has the same meaning as it has under the

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small organizations[172] and small governmental jurisdictions,[173] collectively referred to as "small entities."[174] Roughly, this category includes businesses with fewer than 500 employees or less than $5 million in sales.[175] According to Professor Verkuil's comprehensive

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[170] 601 (1982); S. Rept. 95-1322, 95th Cong., 2d Sess. 1 (1978).

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[171] Small Business Act, 15 U.S.C. § 672 (1982) unless, after public comment, the agency publishes a different definition. 5 U.S.C. § 601(3) (1982). The Small Business Act defines "small business" as "one which is independently owned and which is not dominant in its field of operation." 15 U.S.C. § 172 (1982).

[172] The term "small organization" is defined to mean:

> Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

Regulatory Flexibility Act, supra note 170, at § 601(4).

[173] The term "small governmental jurisdiction" is defined to mean:

> Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

Regulatory Flexibility Act, supra note 170, at § 601(5).

[174] Regulatory Flexibility Act, supra note 170, at § 601(6).

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study of the Act, its enactment represented "a stunning achievement for the small business community and its representatives because it requires virtually all government policymaking to be sensitive to small business concerns."[176]

The goal of the RFA is to insure that agencies "fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation."[177] To achieve this goal, the Act imposes several procedural requirements, many of which had already been imposed by Executive Orders 11821, 12044 and 12291.[178] First, each agency[179] must publish, at least semi-annually, a "regulatory flexibility agenda" of all proposed or pending rules which are "likely to have a significant economic impact on a substantial number of small entities."[180] The agency must give notice of the agenda to the Small Business Administration (SBA) and to affected "small entities" for comment, to "assure that small entities have been given an opportunity to participate in the rulemaking. . . ."[181] At

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[175] (Continued from previous page) See, Office of Advocacy, United States Small Business Administration, The Study of Small Business (1977).

[176] Verkuil, A Critical Look at the Regulatory Flexibility Act, 1982 Duke L. J. 213, 215-16 (1982).

[177] Regulatory Flexibility Act, supra note 170, at § 601 note.

[178] See, Verkuil, supra note 176, at 254.

[179] The RFA adopts the Administrative Procedure Act's definition of "agency" which broadly includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . " excluding governmental bodies such as Congress and the courts. Administrative Procedure Act, 5 U.S.C. § 551(a) (1982). Section 601(2) of the RFA makes it applicable to any rule promulgated pursuant to the notice and comment requirements of 5 U.S.C. § 553(b) or "any other law," with certain other exceptions for rules particularly applicable to rates, wages, prices, or

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[180] Regulatory Flexibility Act, supra note 170, at § 602(a)(1). The terms "significant economic impact" and "substantial number" are not defined by the Act.

[181] Regulatory Flexibility Act, supra note 170, at §§ 602(b) & (c), & 609.

the time that it proposes a rule in the Federal Register, the agency must publish an "initial regulatory flexibility analysis" that describes the impact of the proposed rule on small entities.[182] A similar analysis must be published upon adoption of the rule.[183] Finally, each agency is required to develop a ten-year plan to examine existing and proposed rules which might have a "significant economic impact" on "a substantial number of small entities."[184]

The threshold provision of the Regulatory Flexibility Act reverses the presumption of the executive orders. The regulatory flexibility analysis (RFA) is applicable to all rules subject to Section 553(b) of the Administrative Procedure Act, unless the agency certifies that a rule will not "have a significant economic impact on a substantial number of small entities."[185] The agency must publish this determination with the proposed rule and "a succinct statement explaining the reasons for such certification" and provide a copy to the Chief Counsel for Advocacy of the Small Business Administration.[186] Agency heads are also empowered to waive or delay the completion of the preliminary RFA in emergencies,[187] but they may not waive the final RFA.[188]

Professor Verkuil suggests that in making the "significant economic impact" finding, an agency must attempt to isolate and measure the costs of the proposed rule and to engage in a market share analysis.[189] In deciding what sorts of economic impacts should be considered "significant," he suggests as a rule of thumb a five to ten percent loss of profit margin.[190] With respect to the definition of "substantial number of small

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[179] (Continued from previous page) facilities, inter alia. Regulatory Flexibility Act, supra note 170, at § 601(2).

[182] Regulatory Flexibility Act, supra note 170, at § 603.

[183] Regulatory Flexibility Act, supra note 170, at § 604.

[184] Regulatory Flexibility Act, supra note 170, at § 610.

[185] Regulatory Flexibility Act, supra note 170, at § 605(b).

[186] Regulatory Flexibility Act, supra note 170, at § 605(b).

[187] Regulatory Flexibility Act, supra note 170, at § 608(a).

[188] Regulatory Flexibility Act, supra note 170, at § 608(b).

[189] Verkuil, supra note 176, at 244.

[190] Verkuil, supra note 176, at 244.

entities," Professor Verkuil also finds evidence in the legislative history of the Regulatory Flexibility Act to suggest that "forty percent of the small entities in a given geographical or product market would certainly qualify as a 'substantial number.'"[191] Despite injunctions to take the RFA program seriously,[192] agencies have shown little hesitance to invoke the self-certification process to relieve themselves of the obligation to prepare RFAs.[193]

The Act specifies in some detail the contents of the initial and final RFAs. The purpose of the initial RFA is to "describe the impact of the proposed rule on small entities."[194] The analysis must contain:

> (1) a description of the reasons why action by the agency is being considered;
> (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
> (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
> (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
> (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.[195]

In addition, the initial RFA must analyze "significant" alternatives to the agency's proposed action such as:

> (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
> (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule

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[191] Verkuil, supra note 176, at 245.

[192] See, Verkuil, supra note 176.

[193] See, Verkuil, supra note 176, at 242 n. 171 (other cites).

[194] Regulatory Flexibility Act, supra note 170, at § 603(a).

[195] Regulatory Flexibility Act, supra note 170, at § 603(b).

for such small entities;
(3) the use of performance rather than design standards; and
(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

The analysis of alternatives, however, need only be undertaken to the extent that it is "[c]onsistent with the stated objective of applicable statutes."[196] Arguably, this qualifying phrase relieves the agency of any obligation to identify and consider any alternatives that are inconsistent with the objectives of its enabling act. However, one could also argue that while the Act does not empower an agency to chose an alternative that is inconsistent with its enabling act,[197] Sections 603 and 604 require the agency to analyze those alternatives. This would not necessarily be a futile exercise. Although of little practical use to the agency decisionmaker, the analysis could be valuable to Congress and the public in deciding whether or not to empower the agency to adopt the alternatives in the future.

When the agency promulgates its final rule, it must prepare a final RFA containing:

(1) a succinct statement of the need for, and the objectives of, the rule;
(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and
(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement
of the reasons why each one of such alternatives was

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[196] Regulatory Flexibility Act, supra note 170, at § 603(b).

[197] The Regulatory Flexibility Act is quite clear that its regulatory analysis requirements "do not alter in any manner standards otherwise applicable by law to agency action." Section 606. Unless otherwise applicable standards, however, precluded the agency from analyzing alternatives that it could not choose, the regulatory analysis requirements of Sections 603 and 604 of the Regulatory Flexibility Act would seem to require that they be analyzed. Regulatory Flexibility Act, supra note 170, at §§ 603, 604, 606.

rejected.[198]

Congress clearly intended for the final RFA to follow up on significant issues and alternatives raised in the initial RFA and the public comments on the initial RFA and the rule. In addition, Congress specified that in preparing RFAs the agency was free to adopt either a quantifiable or numerical description of the rule's effects or "more general descriptive statements" if quantification is not "practicable or reliable."[199]

The Regulatory Flexibility Act explicitly forbids judicial review of an agency's threshold decision and of the adequacy of the RFA, except to the extent that the adequacy of the RFA is germane to the larger determination of the adequacy of the entire record to support the agency's final rule.[200] The Act does not otherwise provide for review of the threshold and adequacy questions. Liberal reference throughout the Act to the Chief Counsel for Advocacy of the Small Business Administration, however, indicates that Congress expected that that official would provide an oversight function. The statute, however, does not give the Chief Counsel for Advocacy any power to do more than "jawbone" with an agency.[201] Executive Order 12291, on the other hand, gives OMB a coordinating role with respect to the analysis, transmittal, review, and clearance provisions of the executive order, the Regulatory Flexibility Act, and the Paperwork Reduction Act.[202] OMB has promulgated a document entitled

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[198] Regulatory Flexibility Act, supra note 170, at § 604(a).

[199] Regulatory Flexibility Act, supra note 170, at § 607.

[200] Regulatory Flexibility Act, supra note 170, at § 611.

[201] The Chief Counsel for Advocacy of the Small Business Administration testified:

> Our powers are mostly ones of admonishment. Unlike the NEPA statutes, we cannot stop a regulation cold if they have not done something. . . . The most we can do really is fingerpoint and create a ruckus and come up and complain to [Congress] and do a lot of things that will put the heat on the agencies.

Hearings on Oversight of Regulatory Flexibility Act (Part 1) Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 1st Sess. 94 (1981).

[202] Exec. Order No. 12,291, supra note 6, at § 6(b).

"Incorporation Regulatory Flexibility into the Regulation Process: Interim Guidance," which offers general guidelines to agencies on the RFA program.[203]

The Regulatory Flexibility Act has been on the books for too brief a time to attract much commentary from either inside or outside the government.[204] Senate oversight hearings, however, provided an opportunity for people who had been working with the Act for almost two years to comment upon its early implementation.[205] The chief concern raised at the hearings concerned the attempts by the Department of Defense and the Internal Revenue Service to exempt themselves from the Act's requirements.[206] Those agencies took the position that since their rules were exempt from the notice and comment requirements of Section 553(b) of the Administrative Procedure Act, they were likewise exempt from the requirements of the Regulatory Flexibility Act, even though they did occasionally use Section 553(b)'s procedures voluntarily.[207] Legislation

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[203] Office of Management and Budget, Incorporating Regulatory Flexibility into the Regulatory Process: Interim Guidance (December, 1980).

[204] The principal exemption is the exhaustive study prepared for the Administrative Conference by Dean Paul R. Verkuil. Verkuil, supra note 176. Although it does not examine and comment upon current agency practice, it does identify many of the problems that have since begun to arise in the implementation of the Regulatory Flexibility Act.

[205] Regulatory Flexibility Act: Joint Hearings Before the Subcomm. on Regulatory Reform of the Senate Comm. on the Judiciary and Before the Subcomm. on Government Regulation and Paperwork of the Senate Comm. on Small Business, 97th Cong., 2d Sess. (1982) [hereinafter cited as Joint Reg. Flex. Hearings].

[206] See, Joint Reg. Flex Hearings, supra note 205, at 12 (testimony of Senator Christopher J. Dodd); 22-25 (testimony of Mr. Frank Swain, Chief Counsel for Advocacy, Small Business Administration); 59 (testimony of the Small Business Legislative Counsel); 63 (testimony of the National Federation of Independent Business).

[207] The arguments of the Department of Defense (DOD) and the Internal Revenue Service (IRS) are similar, but distinct. DOD contends that it is exempted from Section 553(b) and, hence, from the requirements of the Regulatory Flexibility Act by the "military or foreign affairs"

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was introduced to deal with this problem, but it was not enacted, and the matter presently remains unresolved. Although the issue was limited to the practices of two agencies, it has great significance for future implementation of the Regulatory Flexibility Act. If the agencies are correct in arguing that all rules that are exempt from Section 553(b)'s notice and comment rulemaking requirement are likewise exempt from the Regulatory Flexibility Act's regulatory analysis requirements, then the "good cause" exemption of Section 553(b) provides a potential loophole for any agency action for which the agency in good faith finds that notice and comment are "impracticable, unnecessary, or contrary to the public interest."[208] So far, agencies have not attempted to take advantage of this potential escape route.

The Chief Counsel for Advocacy of the Small Business Administration, the principal executive branch overseer of the regulatory flexibility program, has complained that agencies have not always performed adequate threshold analyses. For example, some agencies have distinguished between regulations that are good for small businesses and those that harm them and

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[207] (Continued from previous page) exemption of Section 553(a)(1). See, Joint Reg. Flex. Hearings, supra note 205, at 50-51 (testimony of Kathleen A. Buck, Assistant General Counsel, Department of Defense). IRS argues that it is exempt because most of its rules are "interpretative rules" and therefore exempt under the exemption of the last sentence of Section 553(b). See, Verkuil, supra note 176, at 239.

[208] Administrative Procedure Act, supra note 179, at § 553(b). See, Verkuil, supra note 176, at 240. ("Congress surely would not have provided agencies with such a convenient escape from regulatory-flexibility analyses; therefore any agency that uses the good-cause exception for that purpose should be closely scrutinized by the SBA's Office of Advocacy.") The provision in the Regulatory Flexibility Act that a regulatory flexibility analysis must accompany rules promulgated pursuant to Section 553 or "other law" partially alleviates this problem. Even when an agency is arguably exempt from Section 553's notice and comment procedures, it may still be bound by other law to use such procedures and therefore to prepare a regulatory flexibility analysis. For example, some agencies have by regulation bound themselves to use notice and comment procedures to promulgate some regulations. These regulations are arguably "other law" rendering the regulatory flexibility analysis requirements applicable. See, Verkuil, supra note 176, at 240.

prepare regulatory flexibility analyses only for the latter regulations.[209] Similarly, some agencies have considered only direct effects on small businesses in making threshold determinations and ignored indirect effects.[210] Finally, although the Chief Counsel's Office had no reason to question agency self-certifications that rules did not have a "significant impact on a substantial number of small businesses," the agencies have not always done a good job of justifying the certification with a succinct statement of reasons for the certification.[211] This is of some importance, because agencies generally certify that the regulatory flexibility analysis is inapplicable to approximately 90 percent of all regulations.[212] Hence, for most regulations, the threshold certification is the only time that the agency thinks about the impact of its rules on small businesses.

The Chief Counsel for Advocacy was generally satisfied with the quality of the few regulatory flexibility analyses that have been prepared.[213] On the more important question whether the analyses had any impact on the decisionmaking process, there were, not surprisingly, mixed reviews. The Chief Counsel for Advocacy and some representatives of small businesses felt that "now that the agencies are aware of RFA requirements, the quality of rulemaking has improved."[214]

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[209] See, Joint Reg. Flex. Hearings, supra note 205, at 44 (criticizing EPA in particular).

[210] Joint Reg. Flex. Hearings, supra note 205, at 45 (criticizing the Federal Home Loan Bank Board in particular).

[211] Joint Reg. Flex. Hearings, supra note 205, at 21-22, 36-37 (singling out the Department of Interior for criticism).

[212] Joint Reg. Flex. Hearings, supra note 205, at 36.

[213] See, Joint Reg. Flex. Hearings, supra note 205, at 36. ("[W]e have found that once an agency has decided that an initial regulatory flexibility analysis is necessary, the analysis is, for the most part, fairly extensive and is a good faith attempt to thoroughly analyze the small entity impact and to consider possible alternatives.")

[214] Joint Reg. Flex. Hearings, supra note 205, at 25. See also, id. at 63 (testimony of National Federation of Independent Businesses) (the Act "is already having an impact on rulemaking procedures"); id. at 58 (testimony of Small Business Legislative Council).

Others disagreed complaining that the impact of regulation on small businesses increased during the two years of the Act's existence.[215]

Perhaps the most intense criticism of the Regulatory Flexibility Act centered on its failure to address the issue of institutional review. Soon after its enactment, the D.C. Circuit affirmed a district court holding that the courts were not empowered to second-guess agency certifications that rules would not have a significant impact on a substantial number of small businesses.[216] While it is difficult to argue with the court's conclusion, several representatives of small businesses have questioned whether the Act can be implemented effectively without judicial review of the threshold question.[217] Others, however, have argued that public pressure and the ability of the Office of Chief Counsel for Advocacy of the Small Business Administration to "jawbone" the agencies should ensure that they do not avoid their regulatory flexibility analysis responsibilities.[218]

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[215] Joint Reg. Flex. Hearings, supra note 205, at 62 (testimony of Mr. Charles Ackerlow); 56 (testimony of Shaw Mudge).

[216] Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984).

[217] See, Joint Reg. Flex. Hearings, supra note 205, at 11 (testimony of Senator Christopher J. Dodd); 134 (testimony of Charles Dangers). ("[U]nless agency compliance with the Regulatory Flexibility Act can be policed by judicial review, the Act, for all practical purposes and intents, will be rendered meaningless.")

[218] See, Joint Reg. Flex. Hearings, supra note 205, at 67 (testimony of Dean Paul R. Verkuil).

CHAPTER 4
REGULATORY ANALYSIS AS A VEHICLE FOR REGULATORY REFORM

I. Introduction.

Although the regulatory reform initiatives discussed in Chapter 1 have spun off in many different directions, the three regulatory reform themes -- rational decisionmaking, bureaucratic accountability, and regulatory relief -- merged in the requirements of Executive Order 12291 and the Regulatory Flexibility Act, that agencies analyze the impacts of their regulations on the regulated entities.[1] While one or another of the three regulatory reform themes has dominated through the years, they are all reflected in the goals of the regulatory analysis requirements.

Relying in part on the descriptions of the real world decisionmaking process in Chapter 3 and in part on the extensive literature on the theory of bureaucratic decisionmaking, this chapter will examine the extent to which regulatory analysis can serve as a useful tool for regulatory reform. The chapter will first examine the concept of "regulatory analysis" and attempt to place it in the context of a larger body of experience and thought devoted to the broader practice of "policy analysis." Next, the chapter will discuss the virtues of analysis, suggesting how regulatory analysis can advance the goals of rational decisionmaking, bureaucratic accountability, and regulatory relief. Finally, the chapter will examine many impediments to using regulatory analysis to further those goals and suggest some vehicles for overcoming those impediments. At the same time, the discussion will focus upon some inherent limitations on analysis as a tool for bureaucratic and social change. Recognizing that if expectations are set too high the enterprise is certain to fail, the chapter concludes that structuring regulatory analysis into the regulatory decisionmaking process can ensure modest gains toward the achievement of the three goals. However, it also concludes that it is impossible to tell whether or not the enterprise is worth the effort.

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[1] Numerous other regulatory reform proposals that have been introduced in Congress in the past several years also contain regulatory analysis provisions. See, H.R. 746, 97th Cong., 2d Sess. 101 (1982); S. 1080, 97th Cong., 1st Sess. 601 (1981).

II. Essential Aspects of Regulatory Analysis.

Policy analysis is the process of bringing comprehensive analytical rationality to bear upon a social problem.[2] The analyst must (1) identify the problem; (2) break it down into its constituents; (3) clarify and rank pre-existing goals; (4) identify alternative policies for resolving the problem; (5) investigate the consequences of each alternative, using available information and clearly specified assumptions; (6) measure the consequences against the goals; and (7) select the policy that best advances the goals.[3] Regulatory analysis is simply the process of applying the policy analysis paradigm to regulatory problems. Although not absolutely required by the paradigm, regulatory analysis also relies heavily upon quantitative analytical techniques. In addition, regulatory analysis has historically been closely associated with neoclassical economics,[4] though the analytical frameworks and policy outlooks of that discipline are likewise not essential to the regulatory analysis paradigm.

Regulatory analysis is not a thing -- it is a process.[5] The process consists of at least two functions. First, it

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[2] G. Benveniste, The Politics of Expertise 15 (1977) [hereinafter cited as Benveniste].

[3] See, C. Lindblom, The Policy Making Process 13 (1968) [hereinafter cited as Lindblom]; A. Meltsner, Policy Analysts in the Bureaucracy 154 (1976) [hereinafter cited as Meltsner]; G. Edwards & I. Sharkansky, The Policy Predicament: Making and Implementing Public Policy 7 (1978) [hereinafter cited as Edwards & Sharkansky]; Shubert, Policy Analysis and Public Choice, in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 44, 45 (R. Goldwin ed. 1980); U.S. General Accounting Office, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis Is to Help Control Costs of Regulations 8 (November 2, 1982) [hereinafter cited as 1982 GAO Report].

[4] See, Silberman, Policy Analysis: Boon or Curse for Politicians? in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 37, 39 (R. Goldwin ed. 1980) [hereinafter cited as Silberman]; Introduction, in The Making of

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[5] See, Lundberg, Administrative Decisions: A Scheme For Analysis in The Making of Decisions: A Reader in

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consists of the analytical effort, the intellectual exercise of bringing the regulatory analysis paradigm to bear upon a problem. In institutions like regulatory agencies, this analytical effort is very seldom the work of a single brain; rather, it is a collective effort of many people in several institutional subentities. The nature of the analytical effort can therefore depend heavily upon the structure of the decisionmaking process in the institution, as we have seen in Chapter 3 and will explore further in Chapter 5.

The second function of regulatory analysis is communication. The analyst must communicate the results of his or her analytical efforts to persons or institutional entities that use those results in making decisions. The analyst can communicate orally or in writing. The writing can be located in a separate document (hereinafter referred to as a "regulatory analysis document") or it can be incorporated into the explanatory document that the agency prepares for publication in the Federal Register (hereinafter referred to as the "rulemaking document"). The communications function can be accomplished by making the analyst a part of the day-to-day decisionmaking process, or the analyst can communicate with the decisionmaker from a distance.

This communication function makes regulatory analysis a handy tool for policy management within an agency. Because a good policy analysis will explicitly measure the anticipated consequences of alternatives against articulated policy goals, upper level decisionmakers can use regulatory analysis to communicate policy preferences to analysts and technical staff at lower levels in the agencies. The analysis serves as a convenient vehicle for reviewing the way in which lower level officials are implementing administration policies.

Finally, although regulatory analysis can be useful to decisionmakers in reaching substantive decisions about the regulations that they promulgate,[6] it is thoroughly instrumental in nature.[7] It is not an appropriate vehicle

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[4] Decisions: A Reader in Administrative Behavior 4 (W. Gore and J. Dyson eds. 1964).

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[5] Administrative Behavior 17, 20 (W. Gore and J. Dyson eds. 1964) [hereinafter cited as Lundberg].

[6] See, S. Rep. No. 284, 97th Cong., 1st Sess. 76-77 (1981) [hereinafter cited as S. Rep. 97-284].

[7] See, Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 396-99 (1981) [hereinafter cited as

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for prescribing regulatory goals. Nevertheless, to the extent that bringing comprehensive analytical rationality to bear upon regulatory problems results in less burdensome regulations, regulatory analysis can over time advance the substantive goal of regulatory relief. Advocates of regulatory analysis therefore may be motivated by instrumental concerns for "better regulation," or they may see regulatory analysis as a vehicle for furthering the substantive goal of "less regulation." While it would probably be difficult to find anyone opposed to the first goal, the second goal is likely to brook strong opposition from those who perceive themselves to be beneficiaries of regulation.

III. The Virtues of Regulatory Analysis.

A. Bringing Comprehensive Analytical Rationality to Bear on Regulatory Decisionmaking.

Rational analysis is essential to the integrity of the rulemaking process under the Administrative Procedure Act. Unless an agency can demonstrate both that a rule is rationally related to goals that Congress intended for the agency to consider, and that it has support in the data, assumptions, and reasoning in the rulemaking record, a reviewing court is likely to find that the agency has been arbitrary and capricious in promulgating the rule.[8] Yet the scientists, engineers and technical staff in the regulatory agencies are fully capable of analyzing regulatory problems rationally without the aid of regulatory analysts. They appreciate the value of relating regulatory means to statutory goals, of supporting factual findings with evidence, of providing reasons for assumptions and inferences, and of utilizing resources efficiently. Techno-bureaucratic rationality, in other words, is fully capable of producing regulatory decisions that can survive the

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[7] Diver]; DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257, 329-38 (1979).

[8] See, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Casualty Co., ____ U.S. ____, 77 L. Ed. 2d 451, 458 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Hearings on Cost-Benefit Analysis: The Potential For Conflict of Interest: Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 763 (1980) [hereinafter cited as Conflict of Interest Hearings] (statement by Ms. Joan Claybrook, former Administrator, NHTSA).

minimum rationality requirements of judicial review of rulemaking.

One of the fundamental tenets of the regulatory reform movement, however, is that crafting regulations capable of surviving the bare minimum requirements for judicial review is no longer sufficient.[9] Congress (in enacting the Regulatory Flexibility Act), the President (in promulgating Executive Order 12291) and some states (in requiring regulatory analysis as part of agency decisionmaking) wanted agencies to analyze regulatory problems in more detail, paying particular attention to the economic impact of regulations.[10] Similarly, the intent of some of the more recent regulatory reform proposals in Congress is to make agencies devote greater analytical efforts to regulatory decisionmaking.[11] In the minds of its proponents, regulatory analysis can provide "a basis for improving rational, efficient methods of policy formulation in order to maximize the outputs of public policy in accordance with the values of a democratic society."[12]

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[9] Observers of the regulatory process have concluded that many of its problems "can be traced to the failure of agencies to consider all relevant factors and all the potential implications of their actions before issuing a regulation." Schoettle, The State of the Art in Policy Studies, in The Study of Policy Formation 149, 150 (Bauer and Gergen eds. 1968); see also, S. Rep. 97-284, supra note 6, at 74.

[10] The State of Illinois in 1975 amended its Environmental Protection Act to require that the Institute of Natural Resources complete an Economic Impact Statement on every regulatory proposal presented to the Illinois Pollution Control Board. The Pollution Control Board could not go forward with a rule until it had held a public hearing on the Economic Impact Statement. Croke & Herlevson, Environmental Cost-Benefit Analysis: The Illinois Experience in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods 17 (Swartzman, Liroff, Croke eds. 1982) [hereinafter cited as Croke & Herlevson].

[11] The intent of the regulatory reform proposals is "to shake the agencies by their shoulders and say: 'Look, before you do some of these things, think about it.'" Regulatory Procedures Act of 1981: Hearings on H.R. 746 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 103 (1981) [hereinafter cited as 1981 H.R. 746 Hearings] (testimony of Mr. Richard Berg, Office of the Chairman of the Administrative Conference). See also, S. Rep. 97-284, supra0note 6, at 74.

1. Options Identification.

One of the most frequently articulated complaints about bureaucratic decisionmaking is that the process becomes wedded to a single solution to a regulatory problem too early in the decisionmaking process.[13] Executive Order 12291, the Regulatory Flexibility Act, numerous regulatory reform proposals, and the National Environmental Policy Act all require agencies to consider alternatives to the actions that they initially favor. Yet regulatory analysts in the agencies studied in Chapter 3 often complained of a tendency of the technical staff too easily to adopt a "conveyer belt mind set," focusing upon a single option early in a rule's germination and adhering to that option throughout.[14] If upper level decisionmakers later insist upon viewing more than one option, the technical staff dutifully sandwiches its preferred option between two post hoc red herrings.

Since one of the cardinal principles of comprehensive analytical rationality is that the policymaker should examine all realistically available options before settling upon a solution to a regulatory problem,[15] the regulatory analyst will attempt to identify fresh options and to pressure the technical staff to look harder for alternatives.[16] Relying

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[12] S. Rep. No. 305, 97th Cong., 1st Sess. 43 (1981) [hereinafter cited as S. Rep. 97-305]; see, Foster, An Advocate Role Model for Policy Analysis, 8 Policy Studies J. 958, 959 (1980).

[13] See, Edwards & Sharkansky, supra note 3, at 118; Diver, supra note 7, at 415.

[14] See, Personal Interview with Mr. Al Jennings, Office of Standards and Regulations, Office of Policy, Planning and Evaluation, EPA [hereinafter cited as Jennings Interview]; Telephone Interview with Mr. Robert Hibbert, Director, Standard and Labeling Division, Meat and Poultry Inspection Technical Services, Food Safety and Inspection Service, USDA, April 5, 1984 [hereinafter

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[15] See, Meltsner, supra note 3, at 132. ("A policy analysis without alternatives is like a shiek without oil wells.")

[16] See, Meltsner, supra note 3, at 132-33; E.S. Quade, Analysis for Military Decision, 319 (1964), quoted in Meltsner, supra note 3, at 133.

upon their training in economics, regulatory analysts will search for market-oriented solutions to regulatory problems and explore alternative timing strategies to correspond more closely to production cycles.[17] Similarly, regulatory analysts are likely to explore alternatives that have less burdensome impacts on small businesses.[18] Incorporating regulatory analysis into the regulatory decisionmaking process should, in other words, help to expand the horizons of the technical staff in the program offices. One survey of agency experience with regulatory analysis reports that "most agencies believe that the 'alternatives' element of [regulatory analysis] has had the single most important effect on improving their decision-making procedures."[19]

2. Gathering and Analyzing Information.

Another frequently expressed virtue of regulatory analysis is its capacity to bring information on the beneficial and detrimental aspects of regulatory alternatives to the attention of the decisionmaker in a coherent and systematic fashion.[20]

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14 cited as Hibbert Interview] (speaking of a "conveyor belt mind set").

17 A Survey of Ten Agencies in Experience with Regulatory Analysis (U.S. Regulatory Council), 15-18 (1981) [hereinafter cited as Survey of Ten Agencies]. Market-oriented alternatives include: economic incentives, marketable rights, performance standards, information disclosure, compliance reform, voluntary standard setting, enhanced competition, and tiering.

18 Survey of Ten Agencies, supra note 17, at 16.

19 Survey of Ten Agencies, supra note 17, at 18.

20 See, e.g., Luken & Johnson, The Emerging Role of Benefit-Cost Analysis in the Regulatory Process at EPA 3 (unpublished manuscript dated July, 1984); S. Rep. 97-284, supra note 6, at 75, 149; Regulatory Reform Act S. 1080: Hearings Before the Subcomm. on Regulatory Reform of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 165-67 (1981) [hereinafter cited as Hearings on S. 1080] (testimony of James C. Miller, Chairman, FTC); S. Rep. 97-305, supra note 12, at 45, 53; Memorandum from David Stockman to the Heads of Executive Departments and Agencies, dated June 11, 1981, reprinted in Regulatory Reform Legislation of 1981: Hearings Before the Senate

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The technical staff in the program office can, of course, make information available to decisionmakers, and in fact the technical staff is the source of much of the information that the regulatory analysts use. The regulatory analyst, however, brings to the information-providing task a unique quantitative

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20 Comm. on Governmental Affairs, 97th Cong., 1st Sess. 83 (1981) [hereinafter cited as 1981 Regulatory Reform Hearings]; 1981 H.R. 746 Hearings, supra note 11, at 112 (testimony of Leonard S. Janofsky, President, American Bar Association), and at 302 (testimony of Business Round Table); Council on Wage and Price Stability and the Office of Management and Budget, An Evaluation of the Inflation Impact Statement Program Prepared For the Economic Policy Board (December 7, 1976) (Thomas Dittopkins, principal author) [hereinafter cited as 1976 IIS Report]. Providing information on the impact of regulations was the most frequently cited rationale for regulatory analysis in the interviews of agency regulatory analysts conducted in connection with this Report. Telephone Interview with Mr. Larry Blincoe, Office of Program and Rulemaking Analysis, Office of Plans and Programs, National Highway Traffic Safety Administration, DOT, April 10, 1984 [hereinafter cited as Blincoe Interview]; Personal Interview with Mr. Barry Felrice, Associate Administrator for Rulemaking (then Associate Administrator for Plans and Programs), National Highway Traffic Safety Administration, DOT, May 18, 1983 [hereinafter cited as Felrice Interview]; Telephone Interview with Ms. Judith Segal, Director Policy and Program Planning Staff, Food Safety and Inspection Service, USDA, March 15, 1984 [hereinafter cited as Segal Interview]; Telephone Interview with Mr. John Peak, Legislative and Regulatory Coordination Staff Director, Office of Industrial Policy, Office of the Assistant Secretary for Policy and International Affairs, DOT, June 5, 1984 [hereinafter cited as Peak Interview].

perspective[21] and an "objective" posture[22] that seeks out a broader range of information and nuance,[23] especially upon the detriment side of the ledger.[24] Moreover, the regulatory analyst often has training in techniques for displaying information (charts, tables, graphs, etc.) that can make existing data more accessible to the harried upper level decisionmaker and the general public.[25]

A well-prepared regulatory analysis can "raise the consciousness" of upper level decisionmakers to the impacts that their rules have upon society,[26] making them more

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[21] See, Meltsner, supra note 3, at 154. Moore, Statesmanship in a World of Particular Substantive Choices in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 20, 24 (R. Goldwin ed. 1980); Senate Comm. on Governmental Affairs, 6 Study on Federal Regulation, S. Doc. No. 13, 96th Cong., 1st Sess. 77 (1978) [hereinafter cited as Senate Study on Federal Regulation] ("impact evaluation which quantifies the quantifiable, enumerates and places bounds on non-quantifiable effects, and clearly indicates the range of uncertainties, can assist in more effective decision-making").

[22] See, Regulatory Reform Act of 1983: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 477 (1983) [hereinafter cited as Hall Hearings] (testimony of Mr. Frank Berndt, Chief Counsel, NHTSA).

[23] See, Senate Study on Federal Regulation, supra note 21, at 78; Telephone Interview with Ms. Ellen Kranidas, Acting Associate Administrator for Plans and Programs, National Highway Traffic Safety Administration, DOT, June 13, 1984 [hereinafter cited as Kranidas Interview].

[24] See, 1976 IIS Report, supra note 20; Hearings on S. 1080, supra note 20, at 56 (testimony of James Miller, Chairman, FTC).

[25] See, Kranidas Interview, supra note 23 (purpose of regulatory analysis is to "provide a bird's-eye view of all the issues and regulatory options").

[26] Oversight of Regulatory Flexibility Act: Hearings Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 1st Sess. 285 (1981) [hereinafter cited as Regulatory Flexibility Act Oversight Hearings] (testimony

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sensitive to the costs and other economic impacts of regulation.[27] It can likewise raise the decisionmaker's "comfort level" with respect to the correctness of his or her final decisions.[28] By explicitly probing the distributional impacts of a rule, regulatory analysis can inform the decisionmaker of the groups that are likely to support the rule and those that are likely to be opposed to it.[29] In short, the analysis can tell the decisionmaker what the staff does know and what it does not know about the relevant regulatory issues and thereby allow the decisionmaker to make an informed decision.[30]

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[26] of Stephen Sharp, General Counsel, Federal Communications Commission); Peak Interview, supra note 20.

[27] See, Comment, The Inflation Impact Statement Program: An Assessment of the First Two Years, 26 Am. U. L. Rev. 1138 (1977) [hereinafter cited as 1977 Am. U. L. Rev. Comment] (statement of President Ford); Croke & Herlevsen, supra note 10, at 31 (Illinois experience); Verkuil, A Critical Guide to the Regulatory Flexibility Act, 1982 Duke L.J. 213, 250 (Regulatory Flexibility Act legislative history); S. Rep. 97-284, supra note 6, at 63-64.

[28] Interview with Donald Houston, Administrator, Food Safety and Inspection Service, USDA, April 23, 1984 [hereinafter cited as Houston Interview].

[29] See, United States General Accounting Office, Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations, Despite Limitations, April 6, 1984, [hereinafter cited as GAO Cost-Benefit Report].

[30] Telephone interview with Mr. Loren Lange, Deputy Director, Policy and Program Planning Staff, Food Safety and Inspection Service, USDA, March 13, 1984 [hereinafter cited as Lange Interview]. Two regulatory agency heads have testified to the value of regulatory analysis in enabling upper level decisionmakers to make informed decisions:

> Generally good information yields good decisions. Sometimes we have made poor decisions because we did not know there was information out there or because we relied on poor information. While the process today is more expensive, the public is getting better work from the government.

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3. Justification by Explicit Reference to Articulated Policies.

An agency's policy goals can get lost in the convenience of adherence to precedent and unarticulated bureaucratic folk wisdom.[31] Regulatory analysis resists this tendency by insisting that the analyst attempt to measure regulatory alternatives against expressly articulated policy goals.[32] This in turn induces upper and lower level decisionmakers to think periodically about the ultimate purposes of their rulemaking efforts. By inducing agency decisionmakers to

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[30] Houston Interview, supra note 28.

> OSHA has found that the Regulatory Impact Analysis required by Executive Order and the Regulatory Flexibility Analyses, which are required by the Regulatory Flexibility Act, reveal important information about the capital and operating costs of compliance with various regulatory approaches as well as estimates of reduction in risk to workers. Lacking regulatory analysis, OSHA would not have adequate information on the costs its regulations impose on society or the amount of protection received by workers.

Hall Hearings, supra note 22, at 455 (testimony of Mr. Thorne Auchter, Assistant Secretary for Occupational Safety and Health, DOL).

[31] Mr. Loren Lange, a policy analyst in the Food Safety and Inspection Service of USDA referred to an example in which a regulatory analysis document drafted by the program office stated that "it has always been agency policy that. . . ." In fact, the agency had never really articulated that policy in a public fashion. The regulatory analysis document was the first time that the agency articulated the policy explicitly. Lange Interview, supra note 30.

[32] See, S. Rep. 97-284, supra note 6, at 74 ("[B]y explicitly considering the value judgments involved in regulatory choices, by arraying the range of data available about the effects of those choices, and by requiring a public judgment about those choices to be made, regulatory analysis imposes a regimen which will lead toward more effective use of our resources on behalf of our national objectives."); Segal Interview, supra note 20; Lange Interview, supra note 30.

explain by explicit reference to agency policy why they chose one option over another, regulatory analysis thereby enhances agency accountability and increases agency credibility.[33]

4. Explicit Identification of Information Gaps and Assumptions.

Advocates of comprehensive analytical rationality acknowledge that analysts rarely have enough information to undertake entirely objective analyses of all of the pros and cons of several regulatory alternatives. A good analysis, however, will identify the gaps in the available information, draw appropriate inferences from the existing data, and identify the assumptions that the analyst has relied upon in extrapolating across information gaps.[34]

Of course, the techno-bureaucratic thinker also encounters information gaps and fills them with assumptions in an intellectual exercise that he or she may loosely describe as "professional judgment." Yet while technical staff's assumptions and inferences may be informed by experience and received professional wisdom, its predictions are often based upon an outcome-oriented policy judgment about how the world should be arranged.[35] The regulatory analysts believe that the technical staff too often hides policy judgment behind an outer veneer of "technical judgment."

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[33] See, Verkuil, supra note 27, at 246; Telephone Interview with Mr. Patrick H. Cody, Acting Director, Regulatory Impact and Executive Correspondence Staff, Program Planning and Development, Agricultural Stabilization and Conservation Service, USDA, April 4, 1983; Segal Interview, supra note 20; S. Rep. 97-284, supra note 6, at 73-74 ("explicit, public resolution of regulatory trade-offs tends to buttress the credibility of the value judgments involved").

[34] Liroff, Cost-Benefit Analysis in Federal Environmental Programs in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods 2 (Swartzman, Liroff, Croke eds. 1982); S. Rep. 97-284, supra note 6, at 73-74; S. Rep. 97-305, supra note 12, at 45. See, S. Rep. 97-284, supra note 6, at 75; Hall Hearings, supra note 22, at 247 (testimony of Mr. Frank Berndt, Chief Counsel, NHTSA).

[35] See, McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science, Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

The regulatory analyst believes that he or she is more likely to be explicit about the policy preferences that motivate his or her choice of assumptions.[36] Moreover, the regulatory analyst can draw upon several analytical techniques to show how his or her predictions depend upon particular assumptions. The upper level decisionmaker (or the general public) will then have a better understanding of how the assumptions affect regulatory policy choices, and they will be aware of the particular policies that inform the choice between the available options.

5. Restraint Upon Inappropriate "Political" Considerations.

Although this Report has focused primarily upon the clash between techno-bureaucratic rationality and comprehensive analytical rationality, the latter way of thinking also clashes with the pluralistic view that regulatory decisions should reflect the interplay among the political forces that are affected by those decisions.[37] Insisting that decisions must be based upon more than the exercise of raw political power, comprehensive analytical rationality distinguishes between "politics" and "policy."[38] Facts do exist, and they can point to appropriate regulatory conclusions. Goals can be ranked, and alternatives can be measured against those goals.[39]

The regulatory analyst believes that well-conducted regulatory analyses can guide agency decisionmakers to rational decisions that are more than mere political accommodations.[40]

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[36] See, A. C. Enthovan & K. W. Smith, How Much is Enough? Shaping the Defense Program, 1961-1969 64 (1971); Meltsner, supra note 3, at 124-25.

[37] See, Behn, Policy Analysis and Policy Politics, 7 Policy Analysis 199 (1981); Horowitz, Social Science Mandarins: Policymaking as a Political Formula, 1 Policy Sciences 339 (1970).

[38] See, Leoni, The Meaning of "Political" in Political Decisions in The Making of Decisions: A Reader in Administrative Behavior 93, 94 (W. Gore and J. Dyson eds. 1964) [hereinafter cited as Leoni]; Behn, supra note 37, at 200-01.

[39] See, Lindblom, supra note 3, at 6.

[40] A good statement of this position is expressed in a Bureau of the Budget Report:

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Moreover, a good regulatory analysis can shield rational decisions from parties who have only their own narrow interests in mind. While a regulatory analysis document may not satisfy the losers of the regulatory battle, it can reassure remote decisionmakers in the White House and Congress and members of the general public that the decision was reached in a consistent and nonpartisan fashion.

6. Identification of "Correct" Regulatory Results.

Many proponents of regulatory analysis believe that it can go a long way toward specifying a result that is the "correct" solution to the regulatory problem. The most ambitious of the regulatory analysts would argue that after subjecting all available alternatives to a rigorous cost-benefit analysis, the decisionmaker should adopt the option with the highest benefit-to-cost ratio. Only in this way can society best optimize the use of its scarce resources.[41]

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> The cynical view of the matter is that rational calculation in government programming is a harmless but ineffectual pursuit, since all important questions are ultimately decided on 'political' grounds. . . . The thesis is wrong if it is taken to mean the findings of skilled and objective analysis of public programs are not influential in decisionmaking at the highest level. In fact, such findings are usually influential and, not infrequently, decisive.

Quoted in Lindblom, supra note 3, at 11. A comprehensive Senate Study on Federal Regulation reached a similar conclusion:

> The need for careful appraisal in impact evaluation is increased by the complexity of regulatory tasks and the forces which can divert regulators away from attainment of Congressional goals, and toward protection of regulated interests or pursuit of administrative convenience.

Senate Study on Federal Regulation, supra note 21, at 77.

[41] Croke & Herlevson, supra note 10, at 26. See, e.g., Behn, supra note 37. Luken & Johnson, supra note 20, at 3. (Cost-Benefit "identifies appropriate changes in the stringency of regulations in its search for alternatives

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7. Securing Successful Judicial Review.

The comprehensive analytical rationality paradigm is not very different from the ideal paradigm for legal reasoning. Legal reasoning breaks problems down into their component parts, identifies options (alternative decision rules), measures those options against previously articulated policy goals (e.g., fairness, justice, and efficiency), and chooses the rule that best advances those goals.[42] Since substantive judicial review of administrative rulemaking focuses upon whether a rule is arbitrary and capricious, given the evidence in the record and the agency's explanation for its decision, a regulatory analysis that effectively states regulatory goals, identifies alternatives, provides information on the advantages and disadvantages of the alternatives, and measures each alternative against existing statutory goals could aid the agency substantially in its attempt to persuade a reviewing court of the rationality of its rulemaking exercise.[43] Conversely, a reviewing court can rely upon a good regulatory analysis to undermine the support for a decision that the analysis does not support.[44] This in turn forces the agency to explain its reasoning process -- one of the important goals of judicial review -- when it appears to depart from that of the regulatory analysis.

B. Facilitating Policy Management.

Although rarely mentioned in the extensive literature on policy analysis, agencies can use analysis as a management tool to ensure bureaucratic accountability.[45] The accountability

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[41] that maximize the net benefits of regulatory actions.") L. Lave, The Strategy of Social Regulation 23-25 (1981) [hereinafter cited as Lave].

[42] One primary difference between legal reasoning and policy analysis would appear to be the heavy focus of legal reasoning upon precedent and reasoning by analogy.

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[43] See, 1981 Regulatory Reform Hearings, supra note 20, at 255 (testimony of Mr. Lester Lave, economist, Brookings Institution).

[44] See Chapter 3 at Notes 529-540.

[45] See, 1981 H.R. 746 Hearings, supra note 11, at 419 (testimony of Congress Watch); Segal Interview, supra note 20.

at stake here is not of the "personnel management" variety typically associated with public administration -- ensuring that lower level officials do their jobs well and on time. Rather, regulatory analysis can become an instrument of policy management. It can help politically appointed upper level policymakers ensure that lower level officials are implementing the policies preferred by the policymakers and not some other hidden agendas known only to them.

Policy management in a large regulatory agency is a more difficult business than an outsider might expect. At first glance, policy management would appear to consist largely of hiring people of the "correct" policy persuasion and monitoring their efforts as proposed rules circulate through upper level management for final clearance. The reality of bureaucratic decisionmaking, however, is much more complicated for several reasons.

First, no upper level policymaker has sufficient time or technical skill to monitor every rule to see if the underlying rationale for the rule adheres to his or her view of appropriate agency policy. Even monitoring selected "major" rules would strain the personal resources of upper level policymakers in many regulatory agencies.

Second, upper level policymakers are not at liberty to hire and fire lower level and mid-management officials at will. Civil Service laws provide ample protections to career civil servants, and only a limited number of "uncooperative" officials can be shunted to irrelevant stations off the primary rulemaking track. More to the point, the lower level officials that can obstruct an upper level political appointee's policy initiatives are very often indispensable to the rulemaking effort. They may belong to the professional staff that manages the technical contracts, writes the background documents, and drafts the preambles to the Federal Register notices. They possess technical skills and experience with past rulemaking efforts that are essential to the rulemaking enterprise.

Third, the lower level staff often has surprisingly powerful allies among the regulated industries, the beneficiary constituency groups, the media, and members of Congress. The upper level policymaker can replace these subordinate policymakers only at considerable risk to the agency's steady-state equilibrium.

Fourth, and most importantly, policymaking is inextricably infused into almost every aspect of the rulemaking enterprise. The professionals on the technical staff routinely make policy. When they resolve ambiguities in the technical data one way rather than another, when they adopt one untested assumption

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42 Policy analysis does not put nearly so great an emphasis on drawing governing principles from previous decisions.

rather than another, when they draw one inference rather than another, and when they demand one level of certainty rather than another, members of the technical staff in the program offices are making policy. They are rarely explicit about this subtle policymaking function, and they may not even realize that they are in fact making policy when they engage in these judgmental activities. But there should be no doubt that they are in fact determining agency policy.

A particular policy viewpoint may be inherent in the very discipline that the technical staff practices. Health scientists may be more risk averse than economists. They are likely to resolve ambiguities and uncertainties in favor of protecting public health without as much regard for the economic consequences. Lawyers in the enforcement division are likely to prefer "command and control" technology-based standards, because they are easier to understand and enforce. Agency economists are likely to suggest taxes and "performance standards," because their experience teaches that such standards are more efficient than "command and control" standards.

The lesson here is that upper level policymakers cannot effectively manage policy through the traditional personnel management tools. They need a different sort of policy management equipment capable of spotting policymaking as it happens at all stages in the internal rulemaking process. The policy management tool must also be capable of providing the upper level decisionmaker with an effective opportunity to exercise discretion with respect to policy choices as they are being made. Regulatory analysis, with its penchant for explicitly measuring regulatory alternatives against previously articulated policy goals, is an ideal candidate for this policy management function.

Policy management in a rulemaking effort requires communication.[46] Upper level policymakers must communicate policy preferences to lower level technical staff, and lower level staff must communicate the policy motivations behind their discretionary decisions. If the ultimate agency decisionmaker could participate in all of the lower level working group meetings where much agency policy is determined and applied, he or she could effectively communicate his or her policy preferences to the staff orally at the meetings. But such "hands on" participation is rarely feasible in a busy administrative agency. Periodic meetings with the staff at certain critical decision points in the evaluation of a rule can likewise facilitate policy communication between the agency policymakers and the agency staff, especially if they take place at crucial junctures when the staff is choosing among significant regulatory options. Yet even this approach requires that busy decisionmakers be "brought up to speed" periodically.

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[46] Meltsner, supra note 3, at 252.

Regulatory analysis can be the vehicle for bringing upper level decisionmakers up to speed quickly on the policy aspects of important agency rulemaking initiatives. The analyst can communicate the results of his or her analytical efforts to upper level decisionmakers in meetings or in briefing documents prepared in advance of meetings. If the regulatory analyst assigned to a subordinate decisionmaking entity (e.g., the working group) is properly doing his or her job, the participants in the subordinate entity should have devoted some attention to determining the policies that they are implementing in the individual rulemaking effort, identified several options for implementing those policies, and discussed the pros and cons of those options in light of the available information. The explicit attention paid to policy in the subordinate decisionmaking entity should facilitate policy communication between lower level officials and upper level policymakers in the much rarer meetings in which they are all participants. For "major" rules, the decisionmaker will also have available the Regulatory Impact Analyses and briefing documents summarizing their contents.

For most rules the upper level decisionmaker does not even have time to monitor the decisionmaking process at frequent intervals. He or she is in effect limited to reviewing near-final drafts of the work of subordinate decisionmaking entities and reading briefing papers summarizing their deliberations. The regulatory analyst's participation in the subordinate decisionmaking sessions should ensure that some attempt is made to communicate policy considerations in the briefing documents even if the analyst does not prepare a written regulatory analysis document. Many agencies, however, are sufficiently convinced of the value of a written document that their internal regulations require analysts to prepare some kind of regulatory analysis document for many "nonmajor" rules.

At the end of the internal rulemaking process for these less important rules, the upper level policymaker can examine the written regulatory analysis documents or the briefing documents, see how the subordinate decisionmaking entity resolved particular policy issues, and decide whether he or she agrees with that resolution. If the upper level policymaker agrees, the rule may proceed on its way, and the participants in the lower level decisionmaking process can assume that they resolved important policy questions in an acceptable fashion. If the upper level policymaker disagrees, he or she can "remand" the rule back to the subordinate decisionmaking entity with instructions to apply a different policy, thereby sending the lower level personnel a very direct message about his or her policy preferences.

In the same way that regulatory analysis can facilitate policy management within agencies, it can facilitate White House policy management for those agencies that are subject to Presidential control.[47] Although it is impossible for a representative from the White House or the Office of Management and Budget to sit in on agency meetings with respect to even very important rules, regulatory analysis can still provide a tool for communicating Administration policy. The Regulatory Impact Analysis that accompanies "major" rules should inform White House or OMB personnel of the policy considerations that motivated the agency to make its regulatory choices. They can in turn communicate policy downward by "remanding" rulemaking efforts for being "inconsistent with Executive Order 12291." Policy can also be communicated through more direct threats to hold up the rule at the review stage unless the the agency implements OMB's preferred policy. Even in the absence of a written document, policy managers at the White House or OMB can convey Administration policy preferences orally to their counterparts at the agencies and to lower level policy analysts who participate in the subordinate decisionmaking entities.

C. Informing Congress and the Public.

Although Congress is not technically a manager of the federal bureaucracy, it does have a very intense interest in how agencies make and implement regulatory policy. In this sense, Congress has a "policy management" function, and regulatory analysis can aid Congress in the same way that it aids upper level agency policymakers and OMB.[48] Oversight committees and individual congressmen want to be aware of the impacts of important rulemaking efforts. They are especially interested in any distributional aspects that agency rules might have upon their constituencies. Committees that write legislation for agencies similarly have an obligation to oversee agency policy implementation to monitor fidelity to congressional intent. Written regulatory analysis documents can perform an important role in holding agencies accountable to Congress.

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[47] See, 1981 H.R. 746 Hearings, supra note 11, at 112 (testimony of Leonard S. Janofsky, President, American Bar Association); Kranidas Interview, supra note 23; Lange Interview, supra note 30.

[48] See, S. Rep. 97-284, supra note 6, at 53, 78-79; Senate Study on Federal Regulation, supra note 21, at 78, 83.

Written regulatory analysis documents can also be a vehicle for making agencies accountable to the public.[49] Regulatory analysis documents can inform members of the public who are especially affected by a particular rulemaking effort of the ways in which the agency expects the rule to impact upon their interests. Deeply affected members of the public are thereby encouraged to participate further in the public rulemaking process.[50]

Regulatory analysts in the agencies have suggested that regulatory analysis documents can enhance the quality of public participation in the public rulemaking process.[51] Most agency employees are quite unimpressed with the quality of public participation in rulemaking proceedings. The typical comment from the public is a tirade against the agency for imposing unnecessary costs or inconvenience on the regulated entities or for providing too little protection to the beneficiaries. Occasionally, one of the submissions will provide some estimate of the rule's anticipated costs but they rarely provide background information and analysis to justify those cost estimates. The agency is left either to accept the estimates (and perhaps redraft the rule accordingly) or to ignore them and risk imposing catastrophic economic losses.

If the agency has undertaken a regulatory analysis of a proposed rule and several alternatives before publishing its proposal for public comment, it already has some idea of the costs that the rule will impose upon the regulated industry. The estimates may not be precise, but they have presumptive validity. It is then incumbent upon the regulatees and the beneficiaries to demonstrate that the agency's estimates are erroneous. Ideally, the regulatory analysis "will shape the outcome of the rulemaking because it will be the focal point of an orderly and structured dialogue between the agency and the persons who must live with the rule after its promulgation."[52]

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[49] See, Meltsner, supra note 3, at 243; S. Rep. 97-284, supra note 6, at 78-79; Senate Study on Federal Regulation, supra note 21, at 78, 83; Houston Interview, supra note 28; Felrice Interview, supra note 20.

[50] See, Conflict of Interest Hearings, supra note 8, at 218 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA); Houston Interview, supra note 28; Hearings on S. 1080 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 2 (1981) [hereinafter cited as 1981 Hearings on S. 1080] (statement of William F. Kennedy, Business Roundtable).

[51] See, Interview with Nancy Wentzler, Office of Information and Regulatory Affairs, OMB, April 18, 1984 [hereinafter cited as Wentzler Interview]; Conflict of Interest Hearings, supra note 8, at 689 (testimony of Ms. Barbara Blum, former Deputy Administrator, EPA) ("The public often uses the information contained in the regulatory analyses in preparing comments on EPA's proposed or final regulations. Additionally, they may challenge the methodology and assumptions used to estimate impacts."); Chapter 3 at Note 196 (USDA); Chapter 3 at Note 463 (DOT); Chapter 3 at Notes 730-739 (DOL); Chapter 3 at Notes 1140-1147 (EPA) (varying opinions).

D. Providing Regulatory Relief.

Many proponents of regulatory analysis suggest that one of its primary virtues is that it will induce agencies to provide relief for regulated entities.[53] To the extent that regulatory analysis is an effective policy management tool and to the extent that policymakers in the White House and the upper reaches of the agencies desire to effectuate regulatory relief, regulatory analysis can be expected to yield that result.[54] Moreover, to the extent that the agency must expend time and resources in analysis, rather than in promulgating rules, the flow of rules can be expected to decrease accordingly.[55]

Some regulatory relief advocates suggest that better analysis will beget fewer rules, because analysis will more often reveal that a rule should not be promulgated than it will suggest that a rule should go forward.[56] The basis for this

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[52] 1981 Hearings on S. 1080, supra note 50, at 2 (statement of Mr. William F. Kennedy, Business Roundtable).

[53] See, S. Rep. No. 878, 96th Cong., 2d Sess. 1 (1980); Office of Management and Budget, Executive Order 12291 on Federal Regulation: Progress during 1982 (April 1983) at 1 (hereinafter cited as 1983 OMB Report].

[54] 1981 Regulatory Reform Hearings, supra note 20, at 10 (testimony of James Miller, Administrator for Information and Regulatory Affairs, OMB); id. at 56 (testimony of Murray Weidenbaum, Chairman, Council of Economic

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[55] 1981 Regulatory Reform Hearings, supra note 20, at 255 (testimony of Mr. Lester Lave, economist, Brookings Institution).

[56] See, Grubb, Whittington & Humphries, The Ambiguities of Cost-Benefit Analysis: An Evaluation of Regulatory

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belief is probably an assumption that agencies have too quickly promulgated regulations in the past without paying adequate attention to their economic impacts. Viewed against this background, better analysis should convince any decisionmaker to issue fewer or at least less burdensome rules.[57] Alternatively, the assumption may be that fewer rules can pass the substantive tests, such as cost-effectiveness analysis and cost-benefit analysis, to which many regulatory analysts would subject new rulemaking initiatives. In any event, many proponents of regulatory analysis are apparently convinced that this essentially instrumental process can advance particular substantive ends.

E. Conclusion.

The foregoing summary of the virtues of regulatory analysis indicates that it can be a very valuable component of regulatory decisionmaking. It has been endorsed by many past and present agency leaders and heralded by prominent students of the regulatory process. Indeed, many agencies have been so impressed with its effectiveness as a decisionmaking tool that

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[54] Advisers); Viscusi, Presidential Oversight: Controlling the Regulators, 2 J. Policy Analysis & Mgmt. 157, 160 (1983) [hereinafter cited as Viscusi].

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[56] Impact Analyses Under Executive Order 12291, in Environmental Policy Under Reagan's Executive Order: The Role of Benefit Cost Analysis (V. Kerry Smith ed. 1984) [hereinafter cited as Grubb & Whittington]; 1977 Am. U. L. Rev. Comment, supra note 27, at 1139 (addressing the purpose of the Inflation Impact Statement); Kranidas Interview, supra note 23; DOT Seminar on Executive Order 12291 and OMB Regulatory Impact Analysis Guidance (1982), at 1 [hereinafter cited as DOT Seminar] (statement of Mr. Thomas Hopkins, Deputy Administrator for Regulatory and Statistical Analysis, Office of Information & Regulatory Affairs, OMB). ("There has been a belief that less burdensome Federal Regulations will result if greater use is made of economic analysis in the process of developing and reviewing regulations.")

[57] See, Hall Hearings, supra note 22, at 455 (testimony of Mr. Thorne Auchter, Assistant Secretary for Occupational Safety and Health, DOL). ("Without a requirement for regulatory analysis . . . , agencies are tempted to adopt a mechanical command-and-control approach to standards which ignores creative alternatives.")

they routinely prepare regulatory analyses for "nonmajor" rules, even when not required by statute or executive order. Yet like any decisionmaking aid, regulatory analysis is not perfect. It has its flaws and inconsistencies, and practical problems will impede its usefulness in the real world. Nevertheless, the potential for regulatory analysis in the decisonmaking process is very large, and it should not be too easily dismissed, as many technical personnel in agency program offices are inclined to do, as merely another burdensome paperwork requirement for the bureaucracy.

IV. Impediments to Analysis.

The preceding description of the virtues of regulatory analysis presents an ideal view of the process of applying comprehensive analytical rationality to regulatory decisionmaking. As might be expected, the ideal suffers considerably in the real world where values conflict, the information available is never adequate, and quantitative techniques encounter huge uncertainties.[58] Even the strongest proponents in academia and government of the virtues of rational analysis in regulatory policymaking acknowledge the limits of rational analysis.[59]

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[58] Observers of the environmental impact assessment process have reached similar conclusions about its ambitious goals:

> Goals are not often entirely clear inuction in The Study of Policy Formation 1, 3-4 (R. Bauer and K. Gergen eds. 19 advance of projects; means and ends are blurred in a synergistic, evolutionary process. The cost of obtaining and processing information are too high to allow for an exhaustive search in every case, and to attempt to do so would paralyze the decisionmaking process. In short, decisions must be cut down to size. Moreover, even when information is available, the search and selection process is biased by the training, experience, and values of the decisionmakers. One common result, particularly with respect to environmental problems, is that long-term goals are sacrificed to short-term demands.

Miller, Anderson, and Liroff, The National Environmental Policy Act: Neither Paper Tiger Nor Straightjacket in Staff of House Comm. on Merchant Marine and Fisheries, 94th Cong., 2d Sess., Workshop on the National Enviornmental Policy Act 35, 39 (Comm. Print 1976). See also, Lindblom, supra note 3, at 12-20; Lundberg, supra note 5, at 21.

[59] See, Cramton and Berg, On Leading a Horse to Water: NEPA and the Federal Bureaucracy, 71 Mich. L. R. 511 (1973) [hereinafter cited as Cramton & Berg]; Edwards & Sharkansky, supra note 3, at x; Banfield, Policy Science as Metaphysical Madness in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 1, 13 (R. Goldwin ed. 1980) [hereinafter cited as Banfield].

Many students of government believe that the limitations inherent in available analytical resources and the frailty of the human mind should lead us to abandon comprehensive analytical rationality as a decisionmaking tool and adopt instead more realistic notions of "bounded rationality."[60] We should understand that decisionmakers are rarely able to do much more than "muddle through" the decisionmaking process, exploring a very limited range of options, relying heavily upon intuition and back-of-the-envelope predictions, and depending on rapid feedback to meet limited short-term uncertainties.[61] Even the strongest proponents in academia and government of the virtues of rational analysis in regulatory policymaking acknowledge the limits of rational analysis.[62]

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[60] See, H. Simon, Administrative Behavior 79 (1945).

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[62] See, Cramton and Berg, On Leading a Horse to Water: NEPA and the Federal Bureaucracy, 71 Mich. L. R. 511 (1973) [hereinafter cited as Cramton & Berg]; Edwards &

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Other critics of comprehensive analytical rationality contend that bureaucratic decisionmaking must retain an important political component.[65] They would argue that purely "scientific" decisionmaking in accordance with comprehensive analytical rationality would be undesirable, because it would thereby lose an important democratic dimension.[66] One prominent student of the bureaucratic process has observed:

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[62] Sharkansky, supra note 3, at x; Banfield, Policy Science as Metaphysical Madness in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 1, 13 (R. Goldwin ed. 1980) [hereinafter cited as Banfield].

[63] See, H. Simon, Administrative Behavior 79 (1945).

[64] Bauer, The Study of Policy Formation: An Introduction in The Study of Policy Formation 1, 3-4 (R. Bauer and K. Gergen eds. 1968) [hereinafter cited as Bauer]; Lindblom, The Science of "Muddling Through", 19 Pub. Ad. Rev. 79 (1959); Diver, supra note 7; Rodgers, Judicial Review of Risk Assessments: The Use of Decision Theory in Unscrambling the Benzene Decision, 11 Env. L. 301 (1981).

[65]

> It is a dangerous delusion to think that the policy scientist can supplant successfully the politician or statesman. Social problems are at bottom political; they rise from differences in opinion and interest and, except in trivial instances, are difficulties to be coped with (ignored, got around, put up with, exorced by the arts of rhetoric, etc.) rather than puzzles to be solved.

Banfield, supra note 59, at 18.

[66] Tribe, Ways Not To Think About Plastic Trees: New Foundations for Environmental Law, 83 Yale L.J. 1315,

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> The notion of some analysts that knowledge will carry the day is absurd. Knowledge does not and cannot govern. Even if we knew everything there would still be obstacles that would ensure the failure of knowledge. America would have to be quite different from what it is for knowledge, alone, to prevail. The diversity of our society and institutions sets the conditions for conflicting values to be maintained. Once we realize that problems of public policy are not solved but adjusted by policymakers, then it should be clear that the degree of trust within our society is equally as important as knowledge.[67]

Regulatory analysts react very negatively to the suggestion that regulatory decisionmakers should merely muddle through the decisionmaking process. Members of the technical staff in the program offices are often just as repelled by the political dimensions of the muddling through decisionmaking model. Like the regulatory analysts, the program staff are believers in rational decisionmaking; they just have a different view of rationality. Although the technicians are often more sensitive to the need of upper level decisionmakers to accommodate contending political forces in making regulatory decisions, both the technical staff and the regulatory analyst believe that rationality, not intuition, should guide the decisionmaking process.

As a purely descriptive matter, the "muddling through" model often appears to fit the decisionmaking process described in Chapter 3 better than the comprehensive analytical rationality paradigm, despite some heroic attempts (as, for example, in OSHA) to write standard operating procedures that require comprehensive analytical input at virtually every step in the decisionmaking process. Nevertheless, we should not abandon the goal of rational decisionmaking too quickly. The politically dominated "muddling through" model also has its vices, not the least of which is its great inefficiency. And the description of the interaction between the regulatory analysis offices and the program offices in Chapter 3 also reveals many instances of successful incorporation of comprehensive analytical rationality into regulatory decisionmaking.

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66 1329 (1974) [hereinafter cited as Tribe, Plastic Trees]; S. Kelman, What About Price Incentives? 41 (1981); Sagoff, Economic Theory and Environmental Law, 79 Mich. L. Rev. 1414 (1981).

67 Meltsner, supra note 3, at 270.

The discussion that follows probes the limitations of regulatory analysis and explores several impediments to the implementation of the comprehensive analytical model in the real-world bureaucratic context. Some limitations are inherent in the paradigm itself. It is, frankly, too ambitious, and, pushed to its purest extremes, it suffers from many of the theoretical limitations that plague utilitarianism as a theory of political economy. But, as we have seen, it has great practical and theoretical virtues as well. To the extent that impediments to its use in regulatory decisionmaking can be removed, the output of the decisionmaking process is likely to be more objective and perhaps less acrimonious.[68] Yet removing impediments to analysis has its own costs in resources, agency morale, and subtle shifts in the benefits and burdens of regulatory programs. Whether the benefits of removing impediments to regulatory analysis are worth the costs is, of course, an entirely relevant question. The following discussion of the limitations of and impediments to analysis should help answer that question.

The impediments that regulatory analysts and upper level decisionmakers in regulatory agencies face can be divided into two broad categories: (1) impediments that arise in the course of preparing regulatory analyses; and (2) impediments to the use of regulatory analysis in the rulemaking process. The following discussion will adhere to these two broad categories.

A. Impediments to Preparing Regulatory Analysis.

1. Conflicting Goals.

Many critics of policy analysis would argue that applying regulatory analysis to administrative rulemaking is doomed at the very first step -- clarifying and ranking the goals for the regulatory process.[69] In this pluralistic society, no single regulatory goal or ranking of goals can command a consensus.[70] Yet without a broad consensus about goals, someone must decide which goals will prevail over others in the context of particular programs. While the regulatory analyst can play a very useful role in clarifying the choices that must be made between inconsistent goals, regulatory analysis standing alone offers no criteria for ranking goals.[71]

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[68] See, Lindblom, supra note 3, at 12. ("The question of the limits of policy analysis is the same as asking how far we can go in reasoning our policy instead of fighting over it.")

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> There is no logic by which one can pass from axiological principles to particular value judgments, and there can be no non-arbitrary way of finding the optimal terms of a trade at the margin among government objectives when -- as is always the case -- they are not given to begin with.

Banfield, supra note 59, at 12. See, Cramton & Berg, supra note 59, at 529; Benveniste, supra note 2, at 85, 87; Bauer, supra note 61, at 12.

Regulatory policymakers often prefer to avoid articulating publicly their goal preferences. Overt goal ranking inevitably antagonizes interests that would prefer different policies, and it places constraint upon administrative flexibility in future actions.[72] Even so, the analyst can aid upper level decisionmakers in clarifying and ranking goals.[73] The regulatory analysis can measure the various options against each of several goals and thereby encourage the appropriate decisionmaker to determine the relative ranking of goals. The upper level policymaker can then rank goals either explicitly, in explaining his or her action in some decisionmaking document, or implicitly as the agency decides similar regulatory questions over time.

Upper level decisionmakers can, however, greatly simplify the analyst's task by attempting to communicate in advance the

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70 See, Silberman, supra note 4, at 37; Edwards & Sharkansky, supra note 3, at 113; Benveniste, supra note 2, at 17.

71 See, Storing, American Statesmanship: Old and New in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 88, 112 (R. Goldwin ed. 1980) [hereinafter cited as Storing]. See also, K. Arrow, The Limits of Organization 17 (1974). ("Rationality, after all, has to do with means and ends and their relationship. It does not specify what the ends are. It only tries to make us aware of the congruance or distance between the two.")

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> Because of difficulties in agreeing on goals, policymakers may skip the stage of clarifying goals and get right down to a discussion of policy options. This bypass has several distinct, albeit somewhat perverse, advantages. If policymakers do not precisely state their goals, they cannot be held accountable for the results of their policy. Also, if goals are vague, it is easier to change them in light of new facts.

Edwards & Sharkansky, supra note 3, at 111; Benveniste, supra note 2, at 85.

73 Benveniste, supra note 2, at 85.

agency's policy preferences, rather than "remanding" regulatory analyses to the technical and regulatory analysis staff on an ad hoc basis. The regulatory analyst should not be left entirely without moorings. An agency's goals may change as statutes and upper level personnel change and as different interests prevail in the ebb and flow of the pluralistic political process. But if there is adequate communication between the regulatory analyst and upper level policymakers, regulatory analysis should be helpful to agency decisionmakers and to reviewing entities such as OMB, Congress, and ultimately the public as they attempt to ascertain the direction that agency policy is taking.

An explicit regulatory analysis document can be especially useful to this latter review function to the extent that it is precise in its specification of possible goals. Given a neutral analysis of how different regulatory options advance different policy goals, the reviewing entity should acquire greater insight into the policymakers' real policy preferences, even if the policymaker would prefer to keep them hidden.

2. Identifying Options.

One of the great virtues of regulatory analysis is its insistence that the agency explore a wide range of options before settling upon a single "solution" to the regulatory problem. Yet there are "inherent limitations on the capacity of a complex bureaucracy to explore alternatives."[74] Several agency employees interviewed in connection with this Report were quick to point out that a fruitful mind can spin out an almost infinite number of alternative solutions for any given regulatory problem. The agencies, however, will never have sufficient resources to explore the pros and cons of every conceivable option.[75] Moreover, the time consumed in analyzing a broad range of options inevitably delays the issuance of many important rules.[76] Finally, even if

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[74] Cramton & Berg, supra note 59, at 531; Benveniste, supra note 2, at 177. See also, Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 10826, 10827 (1981) [hereinafter cited as Forty Questions].

[75] See, Survey of Ten Agencies, supra note 17, at 17.

[76] See, Cramton & Berg, supra note 59, at 528; Edwards & Sharkansky, supra note 3, at 10; Lange Interview, supra note 30; Personal Interview with Mr. Ralph Hitchcock, Director Office of Vehicle Safety Standards, Office of

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regulatory analysts could rapidly analyze a large range of available options, upper level decisionmakers have only a limited capacity to effectively consider them.

Nevertheless, regulatory analysis can play a valuable role in two ways. First, regulatory analysts can bring a fresh perspective to the options-identification effort. They can suggest new options that may never have occurred to the technical staff in the program office. Second, to the extent that the regulatory analysts are involved in the decisionmaking process when options are selected or rejected, they can champion particular options that are attractive from their professional perspectives. The latter topic will be explored further in Chapter 5.

Three impediments stand in the way of an effective options- identification role for regulatory analysis. First, as we have observed in Chapter 3, an agency's regulatory analysts do not always become a part of the decisionmaking process until after the program office has already limited the possible options to a considerable degree. To suggest innovative options late in the decisionmaking process is to demand that the program office backtrack and explore the technical aspects of the new options, an uninviting prospect to an office with responsibility for promulgating rules in a timely fashion.

Second, it may be demanding too much of agency regulatory analysts to expect them to identify many innovative options. Although they have training in thinking about regulatory alternatives, they may lack sufficient technical expertise to be of much use in real regulatory situations where available technologies, not novel concepts, determine realistic regulatory options. Even when they understand the technical issues, regulatory analysts are not always as creative as might be expected. Many regulatory analysts in the agencies do not view options identification as one of their primary roles. If the experience of the agencies described in Chapter 3 is any indication, regulatory analysts do not very often come up with novel options that are worthy of further consideration as the rulemaking progresses. In those agencies, as elsewhere, "the analyst is very much a processor of other people's alternatives."[77]

The options that the regulatory analysts do identify are not always usable as a practical matter. An option may be

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76 Rulemaking, National Highway Traffic Safety Administration, DOT, May 19, 1983 [hereinafter cited as Hitchcock Interview]; See, Chapter 4 at Notes 305-317.

77 Meltsner, supra note 3, at 134.

beyond the agency's statutory authority;[78] it may not be technologically feasible; or it may be utterly unenforceable. Whatever the reason, the technical staff and upper level decisionmakers will probably resist spending many of the agency's scarce resources studying options that cannot be implemented. As a result, agencies generally seek out and explore a fairly narrow range of options that rarely depart far from the options that the agency considered in previous rulemaking efforts. As one mid-level regulatory analyst observed, "what you can do now is very much limited by what you have done in the past."[79]

Third, like the technical staff in the program office, the analysts in the regulatory analysis office are not immune to "tunnel vision." For example, one early study of Regulatory Impact Analyses from several agencies concluded that they showed a general tendency not to explore alternatives that would involve more stringent alternatives.[80]

Even if regulatory analysts to some extent wear blinders like their counterparts in the program offices, mixing the two perspectives together early in the decisionmaking process in subordinate decisionmaking entities (such as working groups and rulemaking teams) can expand the regulatory horizons of both groups and thereby expand the realistic options available to upper level decisionmakers. On balance, the participation of regulatory analysts at the early options identification stage should enhance the quality of regulatory decisions. Agencies should therefore attempt to incorporate regulatory analysis into the decisionmaking process at a very early stage of rulemaking. How regulatory analysis can most effectively be structured into the decisionmaking process to facilitate early input in options identification will be discussed at greater length in Chapter 5.

Despite these impediments to identifying regulatory options, the effort is still very worthwhile. Upper level decisionmakers can rarely stay closely enough involved with the rulemaking process for individual rules to play a large role in seeking out innovative regulatory options. Yet when a staff recommendation contains only one realistic option, the upper level decisionmaker is in a very real sense deprived of his or her decisionmaking authority. The agency technical and regulatory analysis staffs should analyze a broad range of regulatory options. While the staffs may ultimately have a favored alternative, they should list that alternative as only one of a range of realistic regulatory alternatives and thereby present the decisionmaker with a realistic choice.

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[78] See, Chapter 4 at Notes 359-368.

[79] Telephone Interview with Mr. Gail Updegraff, formerly Deputy Director, Policy and Program Planning Staff, Food Safety and Inspection Service, USDA, March 13, 1984 [hereinafter cited as Updegraff Interview].

[80] Grubb & Whittington, supra note 56.

Resource constraints will, of course, limit the extent to which the staffs can comprehensively analyze the costs and benefits of regulatory options. As a realistic matter, agencies will rarely be able to examine more than three or four options with any degree of completeness.[81] This should not, however, dissuade staff personnel from casting their nets broadly at early stages in the rulemaking process. At very early stages the staff should identify a large variety of options. Later, as resources must be devoted to studying options, the staff should gradually narrow down the range of options to the three or four most realistic alternatives. All of the options that the staff considered should be listed in the regulatory analysis and staff briefing documents with brief explanations of why they were not included for further study.[82] The Office of Water Regulation and Standards has found this gradual narrowing technique to be useful in explaining lower level staff conclusions to upper level decisionmakers and ultimately to the public.[83] The model is a good one for all regulatory analysis.

3. Inadequate Information.

The sophistication of a regulatory analysis depends upon the availability of information relevant to regulatory decisions.[84] Executive Order 12291 sets ambitious goals for the regulatory analysts in the agencies,[85] and some agency guidelines are even more ambitious.[86] Unfortunately, ambitious informational goals can rarely be achieved in the real world of regulatory decisionmaking.

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[81] The Senate Study on Regulation suggested that regulatory analyses consider no fewer than three regulatory alternatives and quantify the costs and benefits of each alternative. Senate Study on Federal Regulation, supra note 21, at 85.

[82] The Council of Environmental Quality Regulations for preparing Environmental Impact Statements address the question of options identification in those documents. The Regulations require the agency to "rigorously explore and objectively evaluate all reasonable alternatives, and for all alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.13 (1984). This prescription provides a useful example for regulatory analysis documents. See also, Forty Questions, supra note 71, at 10827; Survey of Ten Agencies, supra note 17, at 17 (suggesting a "phased" approach to identifying and eliminating options).

[83] See, Chapter 3 at Notes 1105-1119.

By far the most frequent impediment to regulatory analysis cited by analysts in USDA, DOT, DOL, and EPA and by observers of regulatory decisionmaking is the lack of adequate information for making the projections necessary to good analysis.[87] Since agency regulatory analysts rarely have

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[84] Benveniste, supra note 2, at 5, 88.

[85] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), at § 3(d).

[86] See, Chapter 3 at Notes 586-591, Notes 1222-1258.

[87] See, Lindblom, supra note 3, at 12-20; 1981 H.R. 746 Hearings, supra note 11, at 261 (testimony of Securities & Exchange Commission); Meltsner, supra note 3, at 270 ("most analysts complain that their work is limited by the availability of data."); GAO Cost-Benefit Report, supra note 29, at 11; Survey of Ten Agencies, supra note 17, at 20; Telephone Interview with Ms. Jennifer Silk, Directorate of Health Standards Programs, Occupational Safety and Health Administration, DOL, April 30, 1984 [hereinafter cited as Silk Interview]; Telephone Interview with Mr. Michael Shapiro, Acting Director, Economics and Technology Division, Office of Toxic Substances, Office of Pesticides and Toxic Substances, EPA, May 23 and 24, 1984 [hereinafter cited as M. Shapiro Interview]; Telephone Interview with Mr. Ralph Luken, Benefits Grants Chief, Office of Policy Analysis, Office of Policy and Program Evaluation, EPA, May 25, 1984 [hereinafter cited as Luken Interview]; Personal Interview with Mr. John M. Campbell, Deputy Assistant Administrator for Policy, Planning and Evaluation, EPA, June 29, 1984 [hereinafter cited as Campbell Interview]; Telephone Interview with Mr. Henry Thomas, Ambient Standards Branch, Strategies and Air Standards Division, Office of Air Quality Planning and Standards, Office of Air and Radiation, EPA, May 25, 1984 [hereinafter cited as Thomas Interview]; Telephone Interview with Mr. Albert Nichols, Acting Director, Economic Analysis Division, Office of Policy Analysis, Office of Policy, Planning and Evaluation May 22, 1984 [hereinafter cited as Nichols Interview] Telephone Interview with Mr. Craig Vogt, Deputy Director, Criteria and Standards Division, Office of Drinking Water, Office of Water, EPA, June 26, 1984

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sufficient time and resources to undertake original research, they are perforce limited to using existing "off-the-shelf" cost studies, unvalidated health and safety information and even anecdotal evidence.[88]

For several reasons, existing data bases are rarely adequate to the task of regulatory analysis. First, to meet the ambitious analytical goals of the Executive Order and individual agency guidelines, regulatory analysis documents would require well-designed scientific studies of an extraordinarily broad range of human and natural cause-effect relationships. Second, the studies that do exist were usually undertaken for entirely different purposes and therefore do not often fit all of the informational needs of regulatory analysis. Finally, much of the information that remains cannot legitimately be afforded the dignity of the label "study." Analysts piece together snatches of information from a government statistic here, a corporate report there, and add a liberal sprinkling of anecdotal evidence derived from frequent telephone calls and perhaps a site visit or two. Not surprisingly, the regulatory analysis documents that result do not always cite the sources of information that they rely upon.[89]

Having collected the available studies, the agency analysts next attempt to "massage" the existing data to make it more usable, but in reality this often consists of little more than heroic attempts to "gloss over" glaring weaknesses in the

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87 [hereinafter cited as Vogt Interview]; Telephone Interview with Mr. Dale Ruhter, Chief, Economic Analysis Branch, Waste Management and Economics Division, Office of Solid Waste, Office of Solid Waste and Emergency Response, EPA, July 10, 1984 [hereinafter cited as Ruhter Interview]; Peak Interview, supra note 20 (DOT, Office of Industry Policy); Hall Hearings, supra note 22, at 616 (testimony of Ms. Fran Dubrowski, Natural Resources Defense Council); Segal Interview, supra note 20; Wentzler Interview, supra note 51.

88 See, Thomas Interview, supra note 84 ("You can get enough money to do the analysis, but you are confined to the data bases that are there already."); Peak Interview, supra note 20; Telephone Interview with Mr. Arthur Gass, Office of Risk Reduction Technology, Directorate of Health Standards Programs, Occupational Safety and Health Administration, DOL, July 23, 1984 [hereinafter cited as Gass Interview].

89 1981 Regulatory Reform Hearings, supra note 20, at 226 (testimony of General Accounting Office).

data.[90] The net result is an analysis that is laced with guesswork and plagued by large uncertainties.[91] Nevertheless, since the agency can rarely avoid making a decision, it uses the best information that it can assemble and accepts the resulting uncertainties in its assessments and predictions.

a. Inadequate Cost and Economic Impact Studies.

The agencies usually have sufficient resources to conduct or contract for primary cost studies. These consist largely of predicting how the regulated industries will react to each of the proposed alternatives for the standard and estimating how much that will cost.[92] Cost estimates can be derived from vendors of compliance equipment, from "tear down" studies that the agency or its contractors conduct,[93] and from the industry's own estimates of compliance costs.[94] While it is sometimes difficult to verify the accuracy of these assessments,[95] they can usually be undertaken with some measure of objectivity.

Even primary cost studies, however, can be difficult for "performance standards," which give the regulated entities great leeway in designing a compliance scheme, because the agency cannot know in advance how the individual entities will react to the standard.[96] The agency can, of course, make

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[90] Nichols Interview, supra note 84.

[91] See, GAO Cost-Benefit Report, supra note 29, at 1.

[92] See, Survey of Ten Agencies, supra note 17, at 20.

[93] See, Chapter 3, at Notes 315-324 (NHTSA) and at Notes 401-411 (FAA).

[94] Hurter, Tolley & Fabian suggest that three broad techniques exist for calculating the direct costs of regulation: "(1) the survey technique, (2) engineering estimation, and (3) statistical estimation." Hurter, Tolley & Fabian, Benefit-Cost Analysis and the Common Sense of Environmental Policy in Cost-Benefit Analysis

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[95] Ruhter Interview, supra note 84; Survey of Ten Agencies, supra note 17, at 21-22; Chapter 3 at Notes 123-126 (FSIS).

[96] See, Hall Hearings, supra note 22, at 121 (testimony of Ms. Joan Claybrook, former Administrator, National

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"worst case" assumptions based upon the expensive technologies that are known to be available, but this pessimistic approach denies the agency any credit for flexibility when it later compares costs to benefits.

Agency analysts also face great analytical difficulties in assessing the cost of complying with regulations that may require (either explicitly or implicitly) regulatees to redesign production processes.[97] In many instances the industries subject to the regulation may have been on the verge of redesigning production process for market reasons unrelated to regulation.[98] Regulatory analysts in the agencies thus have great difficulty in "sorting out various costs attributable to a specific regulation from those due to changing market demand, other regulatory requirements or

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94 and Environmental Regulation: Politics, Ethics and Methods (Swartzman, Giroff & Croke eds. 1982) [hereinafter cited as Hurter, Tolley & Fabian].

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96 Highway Traffic Safety Administration, DOT); Survey of Ten Agencies, supra note 17, at 23. A good example is the EPA task of assessing the costs of compliance with National Ambient Air Quality Standards. See Chapter 3 at Notes 1038-1045. EPA sets ambient standards capable of protecting the public health with an adequate margin of safety, but individual states determine how individual polluters reduce emissions sufficiently to meet the standards. Although EPA offers some guidance to the states, the states can vary widely as to the controls that they impose. This makes any calculation of the costs of compliance with alternative ambient air quality standards extremely complicated. See Thomas Interview, supra note 84.

97 R. Litan and W. Nordhaus, Reforming Federal Regulation 14 (1983) [hereinafter cited as Litan & Nordhaus].

98 See, Survey of Ten Agencies, supra note 17, at 22. An example is the textile industry's reaction to OSHA's cotton dust standard. While a certain amount of production process redesign was required by the OSHA standard, many companies would have been forced to retool even in the absence of the regulation to reduce labor costs and other inefficiencies. Indeed, several textile mills had already retooled by the time that OSHA promulgated the standard. See, American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 525 n. 43 (1981).

broader-purpose redesign of production processes."[99] Because of the analytical difficulties, regulatory analysts in the agencies tend to use "worst case" assumptions, which ultimately over-estimate compliance costs, sometimes by orders of magnitude.[100]

Cost assessments can also be very difficult for large standards that cut across several industries. The costs of a standard for the 8-10 copper smelters in the United States are less difficult to assess than a hazard identification standard that applies to thousands of firms in several standard industrial categories.[101] Even marginally sophisticated cost analysis for these large standards consume large quantities of an analyst's time and resources.[102]

Once primary costs are assessed, a good regulatory analysis should undertake an assessment of the financial impact of imposing those costs on the regulated entities. This, too, can be extremely complicated for several reasons. Companies are not always willing voluntarily to share financial information with EPA, because many of them believe that financial records are trade secrets that might find their way into the hands of competitors.[103] While many agencies have statutory authority to demand financial information, many do not.[104] Those agencies that do have statutory authority to gather data must do so in industry surveys which, under the Paperwork Reduction Act,[105] must be approved by OMB. In the recent past, OMB has been very niggardly in approving such surveys, thereby forcing agencies to make "ballpark" estimates or "worst case" predictions that the regulated entities can take "pot shots" at in their public comments. Even when the agency gains access to financial information, differing accounting systems can prevent the agency from making accurate predictions about how particular regulations will affect individual companies.

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[99] Survey of Ten Agencies, supra note 17, at 22. See also, R. Merrill, Federal Regulation of Cancer-Causing Chemicals, ch.1, p. 113 (Draft Report to the Administrative Conference of the U.S., April 1, 1982) [hereinafter cited as Merrill Draft].

[100] See, Survey of Ten Agencies, supra note 17, at 22-23; Merrill Draft, supra note 96, at ch. 1, p. 113.

[101] See, Silk Interview, supra note 84.

[102] See generally, McGarity, Media Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation, 46 L. & Contemp. Prob. 159, 181-84 (1983) [hereinafter cited as McGarity, Media Quality].

[103] See, M. Shapiro Interview, supra note 84.

[104] See, Survey of Ten Agencies, supra note 17, at 21.

[105] 44 U.S.C. §§ 3501 et seq. (1982).

Despite the foregoing difficulties with undertaking direct cost and economic impact studies, an ideal regulatory analysis would go further to predict indirect impacts, such as "effects on prices, productivity, employment, capital availability, research and innovation, balance of trade, and the supply of energy and other scarce natural resources."[106] These projections, however, depend upon an extraordinarily complicated array of unquantified and interrelated factors.[107] A serious attempt to analyze these tertiary impacts would take years and consume enormous resources, while the factors would continue to change as the calculations were made. Given real-world resource constraints, agencies can make only the crudest of estimates based upon broad assumptions about economic behavior, none of which are really subject to verification or rejection.[108]

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[106] House Comm. on the Judiciary Regulatory Procedure Act of 1982, H.R. Rep. No. 435, 97th Cong., 2d Sess. 42-43 (1982) [hereinafter cited as H. Rep. 97-435]. See also, Edwards & Sharkansky, supra note 3, at 190; Leone & Jackson, The Political Economy of Federal Regulatory Activity: The Case of Water Pollution Controls in Studies in Public Regulation, 232 (G. Framm ed. 1981); Survey of Ten Agencies, supra note 17, at 20; Merrill Draft, supra note 96, at ch.1, p. 114; Litan & Nordhaus, supra note 94, at 19.

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> For example, in order to project the number of firms that might be forced out of an industry as a result of a proposed regulation, an agency would have to investigate not only the direct capital, operating, maintenance and administrative costs, but also the competitive situation in the industry (both current and potential), the rate of return on investment prevalent in the industry, the availability of capital to firms in or desiring to enter the industry, just to mention a few of the influential factors.

Survey of Ten Agencies, supra note 17, at 20. See also, GAO Cost-Benefit Report, supra note 29, at 11.

[108] See, Survey of Ten Agencies, supra note 17, at 20.

b. Inadequate Benefit Studies.

The analytical difficulties that plague cost and economic impact assessments pale by comparison the problems of objectively analyzing the benefits of many regulations.[109] The nature of the benefits of regulation varies considerably with the nature of the particular regulatory effort. The discussion that follows will therefore focus upon three different kinds of regulation: (1) economic regulation; (2) civil rights regulation; and (3) health, safety, and environmental regulation.

i. Economic Regulations.

Although the benefits of economic regulation are perhaps the easiest to assess, even they are often very difficult to quantify. The benefit of reducing monopoly or oligopoly power is simply the value of those goods that would have been produced in a free, unimpeded market. While relatively sophisticated models exist for calculating these benefits,[110] disagreement still exists over many of the assumptions that they employ.[111] The value to consumers of accurate information about products and investment securities is much harder to calculate. At the very least such a calculation would require an estimate of the amount of consumer dollars lost to fraud in the absence of regulation.[112] For any particular regulation this estimation would be very difficult to verify empirically, because the regulations are prophylactic in nature.[113]

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[109] See, H.Rep. 97-435, supra note 103, at 42-43 ("Benefits are those results intended by the statute, and may include not only improvements in health, safety, environment, and welfare, but also other significant non-health values such as civil rights or increased freedom of choice. Benefits might also include the shifting of an economic burden to those who gained from a particular activity.")

[110] See e.g., Keeler, The Revolution in Airline Regulation in Case Studies in Regulation Revolution and Reform (L. Weiss and M. Klass eds. 1981); Keeler, Airline Regulation and Market Performance, 1972 Bell J. Econ. 399; Friedlaender, Equity, Efficiency, and Regulation in the Rail and Trucking Industries in Case Studies in Regulation Revolution and Reform (L. Weiss and M. Klass eds. 1981); A. Friedlaender and R. Spady, Freight Transportation Regulation: Equity, Efficiency and Competition (1981); Braeutigan, The Deregulation of Natural Gas in Case Studies in Regulation Revolution and Reform (L. Weiss and M. Klass eds. 1981); P. McAvoy and R. Pindyck, Price Controls and The Natural Gas Shortage (1975).

[111] See, Braeutigan, supra note 107, at 162; Benveniste, supra note 2, at 213.

Similarly, regulations aimed at maintaining adequate consumer services have benefits that are very difficult to calculate. The benefits of obtaining a diversity of views in television programming or the benefits of ensuring continuing rail service to particular shippers are not easy to quantify.[114] Likewise, the benefits of deregulatory initiatives that result in better service or lower prices (e.g. airlines or telecommunications deregulation) are not easily reduced to precise dollar values.[115]

ii. Civil Rights Regulations.

The value of regulations aimed at providing equality of opportunity for victims of racial, religious, sexual, and national origin discrimination is not easily converted to dollar amounts.[116] Although a theoretical literature exists on the inefficiencies of discrimination,[117] there are few, if any, models to predict the exact extent to which allocative efficiency would be enhanced by various antidiscrimination devices.[118] For example, the Office of Federal Contract Compliance Programs in the Department of Labor, which has responsibility for policing possible discrimination among federal contractors, proposed to amend its antidiscrimination regulations to reduce the burdensomeness of the existing regulations and to reduce or eliminate some of the existing affirmative action requirements. While the Preliminary Regulatory Impact Analysis that accompanied the proposed rule changes contained several fairly sophisticated estimates of benefits of the amendments in terms of reduced costs to regulated industries, it made no effort to assess the costs to the beneficiaries in terms of the reduced capability of the office to detect discrimination and the loss to beneficiaries due to reduced affirmative action requirements.[119]

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[112] See, 1981 H.R. 746 Hearings, supra note 11, at 259 (testimony of Securities and Exchange Commission) ("it is difficult or impossible meaningfully to estimate all of the direct and indirect effects of SEC rules. . . .").

[113] See, 1981 H.R. 746 Hearings, supra note 11, at 878 (testimony of Commodity Futures Trading Commission). (CFTC rules are "prophylactic in nature and are designed, among other things, to prevent market manipulation, protect fiduciary relationships, and deter fraud in the sector of the economy affected with a national public interest. Quantification of the benefits of such rules is difficult.")

[114] See, 1981 H.R. 746 Hearings, supra note 11, at 280 (testimony of the Federal Communications Commission).

[115] See, 1981 H.R. 746 Hearings, supra note 11, at 280 (testimony of Federal Communications Commission).

[116] Rabkin, Office for Civil Rights in the Politics of Regulation, 347 (J. Wilson, ed. 1980).

[117] Arrow, The Theory of Discrimination in Discrimination in Labor Markets 3 (D. Ashenfelter & A. Rees eds. 1973) [hereinafter cited as Arrow, Discrimination].

Whether or not rules against discrimination increase society's net resources, the value of such regulation goes more to unquantifiable notions of justice, fairness, and autonomy.[120] Even if no attempt were made to place a dollar value on the benefits of such rules, it would be very difficult to quantify these values. There are no scales; there are no units of measurement; and there are no standards of comparison. Yet these are precisely the tools that comprehensive analytical rationality requires if it is to be useful in guiding decisionmakers to rational regulatory results.

iii. Health, Safety, and Environmental Regulations.

The difficulties in obtaining information on the benefits of health, safety, and environmental regulations have been extensively documented in the literature, and they will only be briefly recapitulated here.[121] The complex

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[118] Indeed, it has been suggested that if there is in fact a "preference for discrimination" among some, then allocative efficiency may well decrease as a result of

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[119] See, Department of Labor, Preliminary Regulatory Impact Analysis on Proposed Office of Federal Contract Compliance Regulations (undated).

[120] See, Sunstein, Cost-Benefit Analysis and the Separation of Powers, 23 Ariz. L. Rev. 1267, 1275 (1981).

[121] For a larger elaboration upon the informational problems involved in benefits assessment for health and

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interrelationships between toxic substances and health and environmental effects are at present very poorly understood, and they may never be well understood.[122] Similarly, the benefits of workplace and highway safety regulations are often very difficult to predict.[123]

The best source of information on the health and environmental effects of private activities subject to regulation would be controlled studies done on human beings or in the natural environment. Ethical considerations, however, preclude many kinds of experiments with human beings,[124] and experiments on disruptions of natural ecosystems are very

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118 rules prohibiting racial, sex, national origin, and religious discrimination in the workplace and other arenas. Arrow, Discrimination, supra note 114.

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121 environmental regulations see McGarity, Media Quality, supra note 99, at 183-87; Leape, Quantitative Risk Assessment in Regulation of Environmental Carcinogens, 4 Harv. Envtl. L. Rev. 86 (1980). For a more optimistic view see Lave, supra note 41; Lave, Introduction, in Quantitative Risk Assessment in Regulation (L. Lave ed. 1982) [hereinafter cited as Lave Introduction].

[122] See generally, McGarity, Media Quality, supra note 99; Weinberg, Science and Trans-Science, 10 Minerva 209 (1972); Lovins, Cost-Risk Benefit Assessments in Energy Policy, 45 Geo. Wash. L. Rev. 911, 925 (1977). Merrill Draft, supra note 96, at ch.1, pp. 43-100; Office of Technology Assessment, Technologies for Determining Cancer Risks from the Environment ch.3 (1981) [hereinafter cited as OTA Cancer Report]. Swartzman, Cost-Benefit Analysis in Environmental Regulation: Sources of the Controversy in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Methods 53, 62 (D. Swartzman, R. Liroff, K. Croke eds. 1982).

[123] See, Conflict of Interest Hearings, supra note 8 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA).

[124] See generally, Protection of Human Subjects, 45 C.F.R. 46 (1981); Cowan, Human Experimentation: The Review Process in Practice, 25 Case W. Res. L. R. 533 (1975); Dyck and Richardson, The Moral Justification for Research Using Human Subjects in Use of Human Subjects in Safety Evaluation of Food Chemicals: Proceedings of a Conference 724 (1967).

difficult to design and conduct.[125] Epidemiological studies of groups of humans, such as workers, who have received greater than normal exposures to chemicals can provide some direct evidence of risk, but these studies are notoriously inconclusive.[126] Information on the causes of automobile accidents is similarly elusive and of varying quality.[127] Even information on relatively straightforward benefits, such as the effects of corrosive pollutants on metals, is very difficult to come by.[128] Consequently, very little direct evidence on the benefits of health, safety and environmental regulation is available to agency analysts.[129] Analysts at the Environmental Protection Agency, for example, routinely complain about the lack of available information on cause-effect relationships between toxic chemicals and human health.[130]

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[125] See, e.g., Alexander, Ecological Consequences of Genetic Engineering: Reducing the Uncertainties, 1 Issues in Science and Technology 57 (1985); Sharples, Spread of Organisms with Novel Genotypes: Thoughts From an Ecological Perspective (1982); Hearings on the Environmental Implications of Genetic Engineering Before the Subcomm. on Investigations and Oversight and the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 98th Cong., 1st Sess. 22 (1983) (testimony of Frances E. Sharples); Gelpe & Tarlock, The Uses of Scientific Information in Environmental Decisionmaking, 48 S. Cal. L. Rev. 371 (1974).

[126] See, McGarity, supra note 35, at 740-41; Merrill Draft, supra note 96, at ch.1, p. 45-56; Scientific Bases for Identification of Potential Carcinogens and Estimation of Risk, 44 Fed. Reg. 39,858 (1979); 45 Fed. Reg. 5,009 (1980) [hereinafter cited as IRLG Report].

[127] See, Hitchcock Interview, supra note 73. See, Hall Hearings, supra note 22, at 121 (testimony of Joan Claybrook, former Administrator, NHTSA), and at 357 (testimony of Dr. Bertram Dinman, Vice President for Health and Safety, Aluminum Company of America) ("[Y]ou tend to, in some cases, to exaggerate because even subtly your point of view intrudes; also because you've got to live with the fact if you overestimate on budget, you are not in bad shape. If, however, you underestimate a budget, you're in bad shape.").

[128] See, Baram, Cost-Benefit Analysis: An Inadequate Basis for Health, Safety and Environmental Regulatory Decisionmaking, 8 Ecology L. Q. 473, 483 (1980).

[129] See, Lave, supra note 41, at 33-34.

While tests in surrogate systems, such as animals and greenhouses are often available, they are not directly relevant to the human or environmental experience. For example, cost considerations force laboratory animal studies to use artificially high doses of toxic substances in tests designed to assess their safety in humans or the environment. Reliance upon animal studies for analyses of the benefits of health and environmental regulations raise important questions concerning the appropriateness of particular species, validity of test designs, applicability of exposure routes, and a host of other technical considerations that cloak the analytical enterprise in huge uncertainties.[131] Finally, animal studies are very expensive, and they are beyond the economic capacity of most agencies.[132]

Even if the scientific basis for assessing the health and environmental risks was better established, agency analysts would still encounter difficulties in gathering information on the extent to which humans and the environment are exposed to those activities.[133] EPA, for example, has devised elaborate dispersion models to predict the concentrations of air and water pollutants that result from various regulatory requirements, but these models are plagued with large uncertainties.[134]

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[130] See, Luken Interview, supra note 84; Telephone Interview with Mr. Arnold Kuzmak, Director, Office of Program Development and Evaluation, Office of Drinking Water, Office of Water, EPA, May 22, 1984 [hereinafter cited as Kuzmak Interview]; Ruhter Interview, supra note 84. See, Grubb & Whittington, supra note 56, at 25. Council on Wage and Price Stability, Executive Office of The President, A Review of the Regulatory Interventions of The Council on Wage and Price Stability 1974-1980 26 (January 1981) [hereinafter cited as 1981 CWPS Report].

[131] See generally, McGarity, supra note 35; Merrill Draft, supra note 96, at 58-71; IRLG Report, supra note 123.

[132] See, McGarity and Shapiro, The Trade Secret Status of Health and Safety Testing Data: Reforming Agency

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[133] See, McGarity, Media Quality, supra note 99, at 138; Merrill Draft, supra note 96, at ch.1, pp. 74-82.

[134] See, McGarity, Media Quality, supra note 99, at 181-82, 1985. See generally, text accompanying notes 152-160, infra.

Regulatory analysts face even greater analytical difficulties in assessing the remote and indirect benefits of regulation.[135] It is very difficult to calculate the emotional benefit to people of knowing that the Great Lakes and Galveston Bay are being protected from destruction by water pollution. These benefits are not reflected in simple surrogates, such as market prices of surrounding land. An analyst could attempt to assess such remote and indirect benefits by conducting a nationwide survey, and asking the interviewees how much they valued clean lakes and bays, but the surveys would be very expensive, and they would probably be of questionable accuracy. Similarly, the agencies have devoted little attention to more easily calculated indirect benefits, such as sickness prevented, worker absenteeism avoided, and the pain and suffering attributable to environmental and workplace-induced diseases.[136]

Perhaps for these reasons, the agencies have generally been slow in complying with Executive Order 12291's requirement that they undertake benefits analyses for their major rules.[137] In addition to frustrating agency analysts and OMB

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132 Disclosure Politices, 93 Harv. L. Rev. 837, 849 (1980) (estimating costs of animal tests ranging from 5-7 million dollars); Merrill Draft, supra note 96, at ch.1, p. 59 (estimating costs of $500,000).

[135] See, Costle, Environmental Regulation and Regulatory Reform, 57 Wash. L. Rev. 409, 416-17, 420 (1982).

[136] See, Costle, supra note 132, at 416-17; Baram, supra note 125, at 482; National Academy of Sciences, Institute of Medicine, Costs of Environment-Related Health Effects (1981).

[137] Very few of the RIAs for major rules in USDA contain benefits analyses. See, Chapter 3, at Notes 215-255. The National Highway Traffic Safety Administration and FAA, in the Department of Transportation, on the other hand, attempt to prepare complete benefits analyses for all RIAs. See, Chapter 3, at Notes 503-515. The Occupational Safety and Health Administration has not attempted to monetize the benefits of its standards. See, Chapter 3, at Notes 745-750. While EPA analysts initially did not attempt to quantify benefits in some of their programs, the Office of Policy Planning and Evaluation has more recently begun to insist that the regulatory analysts in the program offices prepare benefits analyses, even if the benefits analyses cannot

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reviewers, this failure to prepare benefits analysis has contributed to the impression that the agency analyses focus predominantly upon the costs of their regulations to the exclusion of benefits.[138]

c. Conclusion.

Many of the informational impediments to regulatory analysis are simply intractable. Agency analysts will always be plagued with inadequate information on tertiary economic impacts and primary health, safety and environmental impacts of rulemaking initiatives. Agency analysts and upper level decisionmakers will simply have to accept these informational limitations and the consequent uncertainties. Still, some initiatives can be undertaken to improve the quality of the information available to the agencies.

On the cost side of the ledger, trade secrecy claims should never shield relevant information from regulatory decisionmakers. While the sort of financial information that is necessary to an adequate economic impact study is unquestionably entitled to protection from disclosure to competitors, it should not be shielded from agency regulatory analysts. Analysts are capable of "sanitizing" the information so that it can be used in regulatory analysis documents without revealing trade secrets. Trade secrets and commercial and propriety data are likewise protected from disclosure under the Freedom of Information Act.[139] Regulated companies should not be allowed to sit back and fire "pot shots" at agency economic impact assessments if they are unwilling to share accurate financial data with the agency.

The Office of Management and Budget could play a role in enhancing the quality of economic impact data available to the agencies by allowing agencies some leeway under the Paperwork Reduction Act to acquire such information in industry surveys. The Paperwork Reduction Act has the laudable goal of preventing agencies from harassing regulated companies with unnecessary paperwork requirements, and OMB should carefully police agency information request to prevent undue paperwork requirements. But information is the life-blood of any regulatory effort, and

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137 be used in the decisionmaking process. See, Chapter 3 at Notes 1245-1307.

[138] See, Costle, supra note 132, at 420.

[139] Chrysler Corp. v. Brown, 441 U.S. 281 (1979); National Parks and Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974); Public Citizen Health Research Group v. F.D.A., 704 F. 2d 1280 (D.C. Cir. 1983).

industry-wide surveys are often the only effective mechanism that agencies have for acquiring accurate financial impact data. OMB should therefore allow agencies to conduct well-conceived economic impact surveys.

Agencies could further enhance the quality of economic impact and benefits analyses by coordinating research efforts with analytical needs. While some agencies, such as the National Highway Traffic Safety Administration carefully coordinate their research efforts with their rulemaking needs, others have been less adept. For example, the Occupational Safety and Health Administration has long had difficulty in coordinating research and rulemaking activities with the National Institute for Occupational Safety and Health, perhaps because the two entities are in entirely different Departments. Even within organizationally simple agencies such as EPA coordination efforts are uneven.

Agency employees in charge of agency research efforts should be included on subordinate decisionmaking bodies (i.e., work group and rulemaking teams) from the very first so that they may respond to the research needs of the technical staff and the agency's regulatory analysts. In addition, agency regulatory analysts should have a role in defining overall research priorities. According to some agency analysts, research efforts aimed at assessing benefits and costs of regulations have in the past played second fiddle to arcane research. Unlike the major research funding organizations, such as the National Science Foundation and the National Cancer Institute, regulatory agency research offices have a responsibility to devote their limited resources to producing information that can be useful in agency rulemaking efforts.

In the final analysis, agencies will never have enough information, even if all of the above recommendations are implemented. It is in the nature of the regulatory beast that decisionmakers will have inadequate information resources that subject analytical efforts to huge uncertainties. This unfortunate state of affairs is not likely to change in the near future.

4. Bias in Cost and Benefit Studies.

An impediment to analysis that goes considerably beyond complaints about information inadequacy is the suggestion that the information available to the agency may be biased toward particular regulatory results. This observation occurs frequently in the literature on regulatory analysis,[140] and it appears to have some basis in fact.[141] Any analytical regime that depends upon information from sources interested in the regulatory outcome must expect to encounter bias in the information that those sources submit.[142] As we have seen, the information available to the agency rarely dictates particular regulatory results. The agency analysts must make predictions about the way that regulated entities and the market generally will react to various regulatory options, and these predictions in turn depend upon assumptions and projections from existing data. When a party with an interest in the outcome of the regulatory activity submits data and analysis, it is natural for that party to cast its submissions in the most favorable light.[143]

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[140] See, Swartzman, supra note 119, at 61-63; Benveniste, supra note 2, at 148.

This is probably not a matter of lying or intellectual dishonesty. Any participant in a potentially adversarial process will have a natural tendency to make assumptions that yield favorable regulatory results.[144] A party will hire experts who exercise their professional judgment in a way that reflects that party's view of the world.[145] Given the dearth

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[141] After a series of hearings on cost-benefit analysis, Representative Eckhardt concluded sadly that in many cases "the most important fact to know about any cost-benefit analysis was who paid for it." Conflict of Interest Hearings, supra note 8, at 683.

[142] See, Hall Hearings, supra note 22, at 136 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA) (referring to "cooperative research" projects between NHTSA and the Motor Vehicle Manufacturers Association). See also, Hall Hearings, supra note 22, at 224 (testimony of Mr. Clarence Ditlow, director, Center for Auto Safety); Nager, Bureaucrats and the Cost-Benefit Chameleon, Reg. 37, 40 (Sept./Oct. 1982).

[143] See generally, Merrill Draft, supra note 96, at ch.1, p. 116.

[144] See, Survey of Ten Agencies, supra note 17, at 23-26. Hall Hearings, supra note 22, at 600 (testimony of Joseph Cannon, Associate Administrator for Policy and Resource Management, EPA), and at 121 (testimony of Ms. Joan Claybrook, former Administrator NHTSA).

[145] See, Bell's Academic Ties, Wash. Post, Dec. 4, 1984, at Gl, Col. 1. Conflict of Interest Hearings, supra note 8; Breyer, Analyzing Regulatory Failure: Mixmatches, Less Restricted Alternatives and Reform, 92 Harv. L. Rev. 549, 572 (1979); Senate Study on Federal Regulation, supra

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of available information on most regulatory issues, however, analysts do not have the luxury of ignoring studies simply because they come from sources with an interest in the outcome of the proceedings.[146]

Yet the possibility of bias in regulatory analysis poses a genuine threat to its viability as a decisionmaking tool. If, in fact, systematic biases are built into the process of applying comprehensive analytical rationality to regulatory decisions, then either the beneficiaries of regulation or the regulatees will not view it as a neutral decisionmaking tool and will therefore be unwilling to accept the legitimacy of decisions that draw heavily upon analysis.[147]

Public interest group participants in the regulatory process, for example, frequently complain that the agencies rely too heavily upon cost studies submitted by the regulated industries.[148] They point out that cost estimates often depend heavily upon information that is exclusively in the hands of the regulated industries and therefore not subject to independent verification.[149] Double-counting of costs and failing to take into account costs savings from retooling and mass production of health and safety technologies are frequently cited criticisms.[150] Public interest group

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145 note 21, at 84-85; S. Rep. 97-284, supra note 6, at 91; 1981 Regulatory Reform Hearings, supra note 20, at 225 (testimony of General Accounting Office); Benveniste, supra note 2, at 21.

[146] See, Hammond & Adelman, Science, Values and Human Judgment in Judgment and Decision in Public Policy Formation 119 (1978); Merrill Draft, supra note 96, at ch.1, p. 112.

[147] See, M. Green & N. Waitzman, Business War on the Law: An Analysis of the Benefits of Federal Health/Safety Enforcement (1979) [hereinafter cited as Green &

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[148] See, Hall Hearings, supra note 22, at 224 (testimony of Clarence Ditlow, director, Center for Auto Safety), at

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[149] Hall Hearings, supra note 22, at 369 (testimony of James English, United Steelworkers) (inability of labor unions

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[150] Survey of Ten Agencies, supra note 17, at 23. See, Hall Hearings, supra note 22, at 369-70 (testimony of James English, United Steelworkers).

observers have also noted that companies may use one set of cost assessments when dealing with federal agencies and another set of estimates when communicating with their shareholders.[151] Regulatory analysts in the agencies recognize the potential for bias in the cost information that they receive.[152] Many analysts, though, do not believe that the potential for bias poses great threats to the integrity of the regulatory process,[153] because they believe that they

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147 Waitzman]; Hall Hearings, supra note 22, at 369 (testimony of Mr. James English, United Steelworkers).

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148 189 (testimony of Joan Claybrook, former Administrator NHTSA), and at 369 (testimony of James English, United Steelworkers).

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149 to verify industry cost estimates because of claimed confidentiality).

151 See, Green & Waitzman, supra note 144; 1981 H.R. 746 Hearings, supra note 11, at 422 (testimony of Congress Watch).

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> Being quite candid, from time to time I have seen estimates of costs which probably are a little bit higher than costs might really be. One study we did on a set of regulations took the industry estimate of costs, the agency estimates of costs for past actions, and looked at them, and we found that the agencies estimate of cost was, in all but one case, closer to the actual costs of the regulation imposed, and even the agency costs were sometimes greater than the actual costs that resulted from the regulation.

Hall Hearings, supra note 22, at 600 (testimony of Mr. Joseph Cannon, Associate Administrator for Planning and Resource Management, EPA). See also, Costle, supra note 132, at 415 (both industry and government have tended to over-estimate the costs of such regulation); Ruhter Interview, supra note 84; Survey of Ten Agencies, supra note 17, at 21; Gass Interview, supra note 85. See,
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153 Ruhter Interview, supra note 84; 1981 Regulatory Reform Hearings, supra note 20, at 255 (testimony of General
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can independently verify industry-submitted cost estimates. Certainly, agency analysts must carefully scrutinize data and analyses that come from interested parties. Some agencies, however, do not have authority to gather information from the regulatees and are therefore hampered in their attempts to assess the accuracy of industry-submitted information.[154]

In addition to monitoring information from potentially biased sources carefully, agencies can reduce the impact of possible bias by collecting information from multiple sources.[155] For example, to check the accuracy of industry submitted cost data on pollution control technologies, an agency could consult vendors of those technologies. This source may be biased, however, because the pollution control vending industry has an economic interest in government regulations requiring industries to install pollution control devices. Working with both sets of potentially biased data, the agency can perhaps make a more accurate cost projection. In extreme cases, agencies can contract for independent studies to verify or refute studies from potentially biased sources.

Agencies can also reduce the possibility of bias in regulatory analysis documents by exposing all submitted information to full public scrutiny.[156] Yet interested members of the public cannot critically examine the factual underpinnings of regulatory analysis documents if the documents do not make accurate citations to the information upon which the agencies rely. Surprisingly, many regulatory analysis documents do not contain clear references to supporting information, thereby hindering independent assessment of their validity.[157] This impediment to public scrutiny can be

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152 generally, Chapter 3 at Notes 116-186 (FSIS, AMS, APHIS, ACSS), Chapter 3 at Notes 315-420 (NHTSA, FAA), Chapter 3

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153 Accounting Office Relating Statements of OMB officials); S. Rep. 97-284, supra note 6, at 89.

[154] See, Survey of Ten Agencies, supra note 17, at 21.

[155] 1981 Regulatory Reform Hearings, supra note 20, at 241 (testimony of General Accounting Office).

[156] See, S. Rep. 97-284, supra note 6, at 91; GAO Cost-Benefit Report, supra note 29, at 241.

[157] See, Lyndon Baines Johnson School of Public AQffairs, Federal Regulatory Reform Programs and the Use of

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eliminated very easily if agencies carefully identify all sources of information upon which they rely and make copies of the original studies available in the rulemaking file.

The scientific community has for centuries attempted to ensure against bias in reported data by subjecting scientific studies to peer review. Several statutes require that scientific studies supporting regulations likewise experience peer review.[158] Although no statute currently requires that agencies subject regulatory analysis documents or the studies underlying those documents to peer review, agencies that suspected potential bias in supporting studies could do so voluntarily. Agencies could establish advisory committees to review submitted information and regulatory analysis documents,[159] or they could establish less formal review mechanisms whereby documents were circulated to independent analysts for review. Outside peer reviewers could be charged with skeptically examining submitted information and probing assumptions for weak spots and policy biases. When questions arise about the possibility of bias in information, agencies should consider circulating the information to experts for peer review of its validity.

Finally, agencies should experiment with cooperative regulatory impact assessments. Under this novel approach, representatives from the agency and all affected parties would review the available information, assess its strengths and weaknesses and agree upon the extent to which it should be relied upon in regulatory analysis documents. The experiment could go even farther and establish cooperative mechanisms for

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152 at Notes 652-714 (OSHA), and Chapter 3 at Notes 937-1147 (EPA).

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157 Cost-Benefit Analysis 36-38 (1984) [hereinafter cited as LBJ School Report]; Survey of Ten Agencies, supra note 17, at 21-22. The author's experience in reading many regulatory analysis documents in connection with this Report also bears out this observation.

158 See, Clean Air Act § 109(d), 42 U.S.C. § 7409(d) (1982); Federal Insecticide, Fungicide and Rodenticide Act §§ 6(b) & 25(d), 7 U.S.C. §§ 136(b) & 136w(d) (1982).

159 See, Administrative Conference Recommendation No. 82-5, 1 C.F.R. § 305.82-5 (1984) (recommending peer review of experimental findings and scientific judgments involving carcinogens through expert advisory panels); Merrill Draft, supra note 96, at 48-86.

setting the research agendas for future rulemaking initiatives.[160]

Cooperative regulatory analysis will not work for every rulemaking initiative. For example, it is not likely to be successful for rules involving numerous affected parties. Too many parties in a cooperative effort reduce the likelihood of the consensus-building that is vital to such an effort. More importantly, cooperative analysis can only work in an atmosphere of mutual trust, an atmosphere that is not likely to exist in a regulatory program that has historically been characterized by highly adversarial rulemaking proceedings. Finally, a cooperative regulatory impact assessment process will only work if there exists some agreed upon mechanism for preparing the analysis in the absence of consensus.

Cooperative regulatory analyses may be doomed to failure in the highly charged atmosphere of many major rulemaking initiatives.[161] Nevertheless, it is probably worth an attempt. All parties to a proceeding have an interest in providing the decisionmaker and the public with an objective assessment of the impacts of regulations. While absolute objectivity is impossible, cooperative risk assessment has the potential for at least assuring the affected parties that the assessments are not systematically biased.

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[160] The Administrative Conference has recommended that federal agencies consider using regulatory negotiation as a means of drafting for agency consideration the text of a proposed regulation. It has also recommended procedures for regulatory negotiation. Recommendation 82-4, 1 C.F.R. § 305.82-4 (1984). The recommendations here apply to the more limited process of drafting regulatory analysis documents.

[161] One attempt at cooperation in rulemaking is EPA's "regulatory negotiation" project that is administered by the Office of Policy, Planning and Evaluation. The purpose of this project is to attempt to bring diverse parties together prior to a rulemaking effort to agree upon the content of the proposed regulation. While it has been subject to some criticism, see Inside EPA, Nov. 12, 1982, at 2, it has proved successful in at least one effort involving the agencies regulations for granting emergency exemptions for unregistered uses of pesticides. It is too early to tell if the project will ultimately be successful. See generally, Inside E.P.A., Nov. 12, 1982, at 2; Levin, Roth To Introduce Bills, Prod. Safety & Liab. Rep. (BNA) 464 (June 12, 1981); EPA Rule Negotiation Project Seems to Meet Expectations of Participants, Ruckleshaus Says [Current Developments] Env't Rep. (BNA) 889 (Oct. 5, 1984); Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4) 1 C.F.R. § 305.82-4 (1984); Mediation Group Reaches No Concensus on Benzene Standard, O.S.H. Rep. (BNA) 347 (Sept. 27, 1984); Schatzow Fades After Tough Opener in Section 18 Committee Meeting, Pesticide & Toxic Chemical News, Oct. 3, 1984, at 7.

5. Inadequate Models.

When the analyst lacks adequate information, he or she must resort to approximations of reality -- or models. Models take existing data and extrapolate them to areas where no data exist. For example, while the primary costs of a particular regulation can often be calculated with real-world information about the price of existing control technologies, secondary impacts, such as the impact of the regulation on the price of products produced by the regulated industry, invariably require analysts to develop and apply mathematical models. Similarly, while the toxic effects of a chemical substance at high exposure levels in laboratory animals can be directly observed through testing, agencies must use risk assessment models to extrapolate to possible human health effects at low exposure levels.[162]

For many natural phenomena, such as planetary motion, the available models are very good approximations of reality. For other phenomena, such as pollutant dispersion and macro-economic trends, the existing models are highly inaccurate.[163] Unfortunately, most of the phenomena of interest to the regulatory analyst fall into this latter category. The extraordinary complexity of social and environmental phenomena confound attempts to create mathematical approximations of reality.[164] Scientists and

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[162] See generally, Leape, supra note 118; McGarity, supra note 35, at 734-35; Merrill Draft, supra note 96, at 83-100.

[163] See, Risk Assessments Should Not Be Used for Cost-Benefit Decisions, Panel Told, BNA Environment Reporter (Current Developments), October 31, 1981, at 820; Large Discrepancy in Cancer Risk Estimates Said a Result of Mathematical Model Choice, BNA Environment Reporter (Current Developments), September 14, 1984, at 769.

[164] See, Banfield, supra note 59, at 9; Moore, Statesmanship in a World of Particular Substantive Choices in Bureaucrats, Policy Analysts, Statesmen: Who Leads? 21, 25 (Goldwin ed. 1980); Telephone Interview with Mr. Robert P. Beliles, Office of Risk Assessment, Directorate

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economists are only beginning to think about how to model many phenomena of direct relevance to policymakers, such as the effects of pollutants on natural ecosystems and the intra-industry competitive effects of regulations. Analysts have made commendable attempts to create sophisticated computer models of reality, stretching available knowledge to its limits. But the products of these efforts still leave much to be desired.

The difficulties that arise in deriving models for complex natural and economic phenomena force analysts to make very large, and often very questionable, assumptions about reality.[165] Depending upon the assumptions that go into the models, their predictions can vary dramatically. For example, the predictions of cancer risk assessment models can vary over ten orders of magnitude.[166] Regulatory analysts are often forced by the inadequacy of existing data to make "worst case" assumptions about the costs and benefits of regulatory alternatives.[167] Worst case assumptions skew the predictions of costs and benefits toward the extremes, thus providing a distorted picture to the decisionmaker.[168]

Cost and benefit projections are highly sensitive to the assumptions that underlie the models that the regulatory analysts employ.[169] Very minor changes in assumptions can

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164 of Health Standards Programs, Occupational Safety and Health Administration, DOL, July 23, 1984 [hereinafter cited as Beliles Interview].

[165] See, Merrill Draft, supra note 96, at 89-92; McGarity, supra note 35.

[166] See, Comment, The Significant Risk Requirement in OSHA Regulation of Carcinogens, 33 Stan. L. Rev. 551 (1981) [hereinafter cited as Stanford Comment]. Merrill Draft, supra note 96, at ch.1, pp. 91, 94; OTA Cancer Report, supra note 119, at Ch. 5.

[167] See, Survey of Ten Agencies, supra note 17, at 23; Council on Environmental Quality Regulations, 40 C.F.R. § 1502. 22(b) (1984); Merrill Draft, supra note 96, at ch.1, p. 92. See generally, Comment, Update: The NEPA Worst Case Analysis Regulation, 14 Env. L. Rpt'r 10267

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[168] See, Lave Introduction, supra note 118, at 3.

[169] See, 1981 Regulatory Reform Hearings, supra note 20 (testimony of Mr. Lester Lave, Brookings Institution); Nager, supra note 139.

have major effects on a model's predictions.[170] And to a large extent, the regulatory analysts are responsible for making the crucial assumptions that permeate the models that they use.

Models tend to oversimplify reality. Simplification begets inaccuracy, and inaccuracies grow as a model's projections get farther and farther from the real-world data.[171] Nevertheless, the results of the modeling effort are often stated with deceptive precision, leading decisionmakers to believe that they know more than they really know.[172] At their best, sophisticated models may be only marginally informative. Pushed past their considerable limitations they can work positive harm upon the decisionmaking process.

Because modeling is an essential tool of the regulatory analyst's trade, agencies that desire to make effective use of analysis should continue to support research into modeling for purposes of regulatory analysis.[173] In addition, periodic meetings or symposia of government regulatory analysts could facilitate exchanges of ideas on how to model complicated phenomena and how to improve existing models.[174]

Modeling does, however, have the potential to mislead. Once the assumptions that are the essence of a model are programmed into a computer algorithm, they can easily become

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167 (1984); Comment, CEQ's "Worst Case Analysis" Rule for EISs: "Reasonable" Speculation of Crystal Ball Inquiry? 13 Env. L. Rpt'r 10069 (1983).

[170] See, Nager, supra note 139, at 41; Stanford Comment, supra note 163.

[171] See, Kranidas Interview, supra note 23; Beliles Interview, supra note 161; Lange Interview, supra note 30; Edwards & Sharkansky, supra note 3, at 170, 186; Banfield, supra note 59, at 26; Jenkins-Smith, Professional Roles for Policy Analysts: A Critical Assessment, 2 J. Policy. Analysis & Mgmt. 88, 90 (1982).

[172] See, Jennings Interview, supra note 14. ("[P]eople start believing in risk assessment numbers. They hang dollar values on it. They try to force-fit into a single number. This makes decisionmaking easier.")

[173] See, GAO Cost-Benefit Report, supra note 29, at 12-13.

[174] Some agencies have initiated symposia on regulatory impact analysis where modeling concepts have been featured. See, DOT Seminar, supra note 56.

inaccessible to those who must rely upon the model's predictions. Regulatory analysis documents should be therefore very explicit about the assumptions that go into the models that they rely upon. Too often, the regulatory analysis document simply names the model that it has relied upon without explaining the critical assumptions that go into the model. Close examination of the literature or of the original computer program may reveal those assumptions, but upper level decisionmakers and the public lack the time and expertise to devine modeling assumptions from primary sources. The regulatory analysis documents themselves should make clear the major nonobvious assumptions that undergird the model or models upon which the analysts base those predictions.[175]

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[175] The Administrative Conference has recommended that agencies, as a general policy, should attempt to identify in public regulation analyses "[a]ny factual assumptions or preliminary findings of the agency to be utilized in the analyses." Recommendation No. 79-4, 1 C.F.R. § 305.79-4 (1984). With respect to the use of carcinogenesis models, the Administrative Conference has recommended that agencies should "explicitly identify . . . [t]he assumptions underlying any extrapolations from animals to man or from high to low exposure levels" and "[o]ther assumptions about the behavior of the substance or about the characteristics of human exposure to it. . . . " Recommendation No. 82-5, 1 C.F.R. § 305.82-5 (1984).

6. Inadequate Tools for Quantification.

Quantification is the regulatory analyst's stock in trade.[176] Without his or her ability to reduce complicated considerations to numbers, the analyst can be no more than a trusted advisor, broadly speculating on the pros and cons of various options with few standards for comparison. Yet while quantification can be of great value to regulatory decisionmaking by permitting comparisons and prioritization,[177] attempts to quantify many of the variables that are important to regulatory decisionmaking can ultimately mislead decisionmakers and the public.

We have already seen how inadequate data and imprecise models befuddle the regulatory analyst's attempt to predict quantitatively the health, safety, environmental, and economic effects of particular regulatory activities. A perhaps more serious impediment to quantitative regulatory analysis is the the apparent immunity of some considerations that may be essential to a rational regulatory decision to quantitative analysis.[178] For example, analysts may never be able to quantify some benefits of regulation, such as the reduction of "pain, suffering, crushed dreams, [and] guilt."[179]

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[176] See, H. Rep. 97-435, supra note 103, at 43. ("The gist of regulatory analysis is numbers.") Senate Study on Federal Regulation, supra note 21, at 77; Benveniste, supra note 2, at 6-7.

[177] See, Senate Study on Federal Regulation, supra note 21, at 77. S. Rep. 97-284, supra note 6, at 81; Lave Introduction, supra note 118; Merrill Draft, supra note 96, at 105-08.

[178] See, Senate Study on Federal Regulation, supra note 21, at 83 (pointing out that this inability to quantify important benefits of health, safety, and environmental regulation distinguish that kind of regulation from economic regulation); Telephone Interview with Ms. Margaret Stasikowski, Acting Director, Chemical Control Division, Office of Toxic Substances, Office of Pesticides and Toxic Substances, EPA, July 11, 1984 [hereinafter cited as Stasikowski Interview]; Silk Interview, supra note 84.

[179] Conflict of Interest Hearings, supra note 8, at 765 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA); Benveniste, supra note 2, at 72.

An excessive preoccupation with quantification can squeeze out variables, such as historic, recreational and aesthetic values, that are difficult, if not impossible, to quantify.[180] This tendency to "dwarf soft variables" can yield a unidimensional view of the world that in practice biases decisionmakers against unquantifiable values.[181] For example, EPA guidelines for preparing RIAs recognize that the available techniques for measuring benefits that it adopts are not complete,[182] but they do not suggest how agency analysts are to account for this failure in measuring the costs of a regulation against its benefits. Since unquantifiable effects may never show up in the regulatory analyst's quantitative predictions of the impacts of a rule, quantitative analysis may crowd out the exercise of policy judgment by upper level decisionmakers.[183]

Policy analysis scholars are well aware of the limitations of quantitative analysis, and they have devoted a good deal of intellectual energy to developing tools for quantifying "soft" variables.[184] Still, it is fair to conclude that the art of quantitative policy analysis has not yet developed to the point at which "soft" variables receive their full due.[185]

Because of these difficulties quantitative predictions in a regulatory analysis will rarely be adequate to guide a decisionmaker, and without more explanation they can mislead upper level decisionmakers and the public. Regulatory analysts should therefore resist the natural tendency to dismiss soft variables and attempt to discuss them thoroughly in the text of regulatory analysis documents, even if the discussion tends to take away from the precision of the analyst's predictions. A thorough discussion of soft variables will necessarily sound soft and unanalytical. Nevertheless, the effort must be undertaken, if only to preserve the credibility of the analytical effort. Executive Order 12291 recognizes this when it requires an RIA to include in its description of costs and benefits a discussion of any "effects that cannot be quantified in monetary terms."[186] Many agency guidelines make similar provisions for the discussion of nonquantifiable variables.[187] Other agencies do not have particularized guidelines, but do to varying degrees attempt to include descriptions of relevant nonquantifiable effects in their analyses.[188] While a discussion of soft variables may not be a complete substitute for quantification, it is better than proceeding ahead without regard for those factors.[189]

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[180] See, Costle, supra note 132, at 418; H. Rep. 97-435, supra note 103, at 43 ([t]hat which can be measured tends to receive more weight than less tangible, though perhaps more important, effects which cannot be quantified.").

[181] See, Tribe, Plastic Trees, supra note 63, at 1318-19; H. Rep. 97-435, supra note 103, at 43; McGarity, Media Quality, supra note 99, at 188-89.

[182] See, Chapter 3, at Notes 1234-1242.

[183] See, Storing, supra note 68, at 111; Survey of Ten Agencies, supra note 17, at 48; S. Rep. 97-284, supra note 6, at 66-67; Verkuil, supra note 27, at 252; Benveniste, supra note 2, at 17.

[184] See, Tribe, Plastic Trees, supra note 63, at 1319-1322.

[185] See, Tribe, Plastic Trees, supra note 63, at 1319; Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, 46 S. Cal. L. Rev. 617, 630, 632-33 (1973) [hereinafter cited as Tribe, Technology Assessment]; McKean, The Use of Shadow Prices in Problems in Public Expenditure Analysis 33, 47-8 (S. Chase ed. 1968); Meltsner, supra note 3, at 219.

7. Characterizing Uncertainties.

Inadequate data, inaccurate models, and the infirmities of quantitative analysis all combine to leave regulatory analysis swimming in uncertainties.[190] This, perhaps, is the greatest challenge to the analyst.[191] If the analyst forthrightly

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[186] Exec. Order No. 12,291 supra note 82, at §§ 3(d)(2), (3).

[187] Environmental Protection Agency, Guidelines for Performing Regulatory Impact Analysis 9-10 (1983) [hereinafter cited as EPA RIA Guidelines]; Department of Transportation, Guidelines for Regulatory Evaluations: A Handbook for DOT Benefit-Cost Analysis 23-24 (1982)[hereinafter cited as DOT Handbook]; Department of

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[188] See, Hall Hearings, supra note 22, at 1658 (Food and Drug Administration); id. at 1900 (Department of Health and

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[189] The Administrative Conference has recommended that regulatory analysis documents address "[t]he agency's

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[190] S. Rep. 97-284, supra note 6, at 81.

[191] Telephone Interview with Mr. Anthony Goldin, Director, Directorate of Policy and Mr. Larry Braslow, Chief of

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confronts the uncertainties inherent in his or her predictions and makes the decisionmaker aware of the general lack of confidence with which he or she speaks, he or she risks rejection by decisionmakers who demand greater certainty. The analyst therefore faces almost irresistible pressures to gloss over uncertainties in making quantitative predictions.[192] Yet if the analyst overstates his or her confidence in his or her predictions, he or she will inevitably midlead the decisionmaker, perhaps disastrously.[193]

The key to dealing with uncertainties in regulatory analysis lies in locating a device for characterizing uncertainties in a way that retains the usefulness of analysis to decisionmakers without causing it to be misleading.[194] Unfortunately, a large proportion of regulatory analysis documents that agencies currently prepare emphasize single value estimates of costs and benefits and shun any serious attempt to characterize uncertainties.[195]

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187 Transportation, Economic Values For Evaluation of Federal Aviation Administration Investment and Regulatory Programs 27 (1981).

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188 Human Services); id. at 2015 (Occupational Safety and Health Administration).

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189 methods for evaluating intangible costs and benefits. . ." Recommendation No. 79-4, 1 C.F.R. § 305.79-4 (1984).

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191 Economics, Office of Regulatory Analysis, Directorate of Policy, OSHA, DOL, July 26, 1984 [hereinafter cited as Goldin and Braslow Interview]; Nichols Interview, supra note 84; Felrice Interview I, supra note 20; Blincoe Interview, supra note 20.

[192] See, Telephone Interview with Mr. Allen Basala, Chief, Regulatory Impact Section, Economic Analysis Branch, Strategies and Air Standards Division, Office of Air
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[193] See, Chapter 3, at Notes 500-501.

[194] See, Senate Study on Federal Regulation, supra note 21, at 78; S. Rep. 97-305, supra note 12, at 57; GAO Cost-Benefit Report, supra note 29.

[195] See, e.g., GAO Cost-Benefit Report, supra note 29.

Perhaps the most effective mechanism for characterizing uncertainties is the "confidence interval" that is typical of scientific reports.[196] The analyst makes a quantitative predictions that is his or her "best estimate" and at the same time predicts with some predetermined degree of confidence (usually 95%) that the result lies between two other points along the same spectrum. The "width" of this confidence margin can at times be more revealing than the best estimate prediction.[197]

When the analysis consists of using mathematical models to make predictions, analysts can characterize uncertainties by applying two or more models to the same pre-existing data.[198] Like confidence intervals, multiple models can be very revealing. Because of the large uncertainties that afflict much regulatory decisionmaking, the models that have evolved in that context can vary dramatically in the results that they predict. For example, one survey of cancer risk assessment

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192 Quality Planning and Standards, Office of Air and Radiation, EPA, May 29, 1984 [hereinafter cited as Basala Interview].

[196] 1982 GAO Report, supra note 3, at 12; GAO Cost-Benefit Report, supra note 29, at 11-14; Chapter 3 at Notes 715-721 (OSHA). One of the prominent regulatory reform bills of the early 1980s would require quantification of benefits, costs and effects of regulation. The numerical estimates, however, were required to "include an explanation of the margins of error involved in the quantification methods and in the estimates used." Hearings on S. 1080, supra note 20, at 12. See, Jennings Interview, supra note 14; Personal Interview with Arthur Fraas, Office of Management and Budget, Office of Information and Regulatory Affairs, May 19, 1983 [hereinafter cited as Fraas Interview]; Survey of Ten Agencies, supra note 17, at 22.

[197] For example, in one instance in the author's experience, an analyst in EPA's Office of Pesticide Programs predicted that granting a pesticide registration to a pesticide that had been shown to cause cancer in laboratory animals would cause 27 cancers over a 70 year period. When pressed for a 95% confidence interval the prediction was expressed as follows: "0 < 27 < 660,000." The confidence interval thus said a great deal about the confidence with which the analyst made his prediction of 27 cancers.

[198] GAO Cost-Benefit Report, supra note 29, at 2, 11.

models discovered that from the same starting data, the predictions could vary over ten orders of magnitude, depending upon the model.[199] The analyst can tell the decisionmaker which model he or she prefers and why, but the decisionmaker must be free to base a decision on any or all of the models. Obtaining predictions from several models gives the decisionmaker and ultimately the public a fair representation of some of the uncertainties that are inherent in all of the predictions.

Still another mechanism for characterizing uncertainties is to subject a model's assumptions to "sensitivity analysis." In a sensitivity analysis the analyst performs the same analytical operation under several different assumptions to determine how sensitive the predictions are to any given assumption.[200] Once the decisionmaker is aware of the sensitivity of the analyst's predictions to particular assumptions, he or she can evaluate the assumptions themselves to determine how much credence to give any particular prediction.

If more sophisticated mechanisms for dealing with uncertainty fail, the analyst may prepare a "worst case" analysis of the costs and/or benefits of regulatory alternatives.[201] This technique, which has achieved some prominence in the environmental impact statement context,[202] can be useful when margins of error cannot be calculated and when the regulatory activity could have disastrous impacts.[203] In performing a "worst case" analysis, the analyst simply calculates the consequences of the worst credible scenario or scenarios and attaches a rough probability to each of those scenarios. One obvious characteristic of this technique is that it tends to skew the analysis by focusing attention on the worst side effects of regulatory action or inaction, even though the "worst case" scenarios are not likely to play themselves out in the real world. Nevertheless, as the Bhopal tragedy makes clear, worst cases do sometimes happen, and it can be useful for the decisionmaker to know the most extreme "downsides" of regulatory alternatives.[204]

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[199] Stanford Comment, supra note 163.

[200] Department of Transportation, Economic Analysis of Investment and Regulatory Decisions -- A Guide 6-1 (1982); Chapter 3 at Notes 500-501; DOT Handbook, supra note 184, at 18-19.

[201] See, A Survey of Ten Agencies, supra note 17, at 22-23.

[202] CEQ Regulations, 40 C.F.R. § 1502.22(b); Save Our EcoSystems v. Clark, 747 F.2d 1240, 1244 (9th Cir. 1984).

[203] Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18032 (1981) [hereinafter cited as Forty Questions]. See generally, Fisher, An Overview and Evaluation of EPA's Guidelines for Conducting Regulatory Impact Analyses in Environmental Policy Under Reagan's Executive Order: The Role of Benefit-Cost Analysis (V. K. Smith ed. 1984).

Occasionally, the available data or the existing models are so imprecise that the analyst can do no more than qualitatively characterize the confidence with which he or she predicts particular results. Even a qualitative characterization, such as "give or take a few thousand," however, can aid the decisionmaker in deciding how much weight to give to the analyst's efforts and how much to consider other kinds of analysis and intuition.

Even though it may mean rejection of the analytical work product, analysts should forthrightly state in the regulatory analysis documents the confidence with which they make predictions. Many tools for characterizing uncertainty exist, and analysts therefore have little excuse not to make at least some effort to characterize them.[205] If analysts make predictions without qualifying them with a statement about confidence or lack thereof, then ultimately the analytical effort could be doomed to failure. Decisionmakers and subsequently the public will realize that the analysts have lulled them into a false sense of security about decisions based upon analysis.[206]

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[204] Other approaches to characterizing uncertainties include the "expected value" approach and the "pessimistic/optimistic" approach. See, Chapter 3 at Notes 477-479.

[205] The Administrative Conference has recommended that public regulatory analysis documents address "[t]he agency's techniques for assessing and revealing uncertainties in its quantitative estimates," and make explicit "the range of error associated with particular quantitative estimates." Recommendation No. 79-4, 1 C.F.R. § 305.79-4 (1984). With respect to carcinogenesis risk assessments in particular, the Adminstrative Conference has recommended that agencies "explicitly identify . . . [t]he range of uncertainty associated with the estimates." Administrative Conference Recommendation No. 82-5, 1 C.F.R. § 305.82-5 (1984).

[206] See, GAO Cost-Benefit Report, supra note 29, at 1; see Hall Hearings, supra note 22, at 572 (testimony of William S. Jordan, Union for Concerned Scientists).

8. Problems of Cost-Benefit Analysis.

Although the particular brand of regulatory analysis that has acquired the label "cost-benefit analysis" is not essential to the application of comprehensive analytical rationality to regulatory problems, it has become so closely associated with regulatory analysis in the minds of its principle practitioners that the special problems that it raises should be explored in any general discussion of the impediments to analysis.[207] Discussion of the impediments to cost-benefit analysis further seem warranted in light of the explicit requirement of Executive Order 12291 that agencies utilize that brand of analysis in the absence of direct statutory prohibitions against its use.[208] Because of the very extensive literature that already exists on the advantages and disadvantages of cost-benefit analysis, however, the following discussion will only touch upon the arguments and provide access to the existing literature.

Cost-benefit analysis is in one sense the culmination of the analytical effort. Once the analyst has gathered all of the available information on the relevant alternatives and produced quantitative impacts assessments, all that remains is to reduce the advantages and disadvantages of each alternative to the same units (usually dollars) to facilitate comparisons. Were this reduction possible in the real world, there would be very little remaining for a rational decisionmaker to do; he or she would simply choose the alternative whose benefits most outweighed its costs. The real-world analyst, however, encounters several problems in his or her attempt to reduce costs and benefits to dollars that preclude a simple application of cost/benefit analysis to regulatory decisionmaking.[209]

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[207] See generally, Diver, Policy Paradigms, supra note 7, at 416-17 (1981); Merrill Draft, supra note 96, at ch.1, pp. 105-106.

[208] Executive Order No. 12,291, supra note 82, at § 2. It is not clear that cost/benefit analysis is required by the Regulatory Flexibility Act. See, Verkuil, supra note 27, at 251 (expressing the view that the Regulatory Flexibility Act does not require a thorough cost-benefit analysis). Two recent regulatory reform bills would also require agencies to prepare cost-benefit analyses for regulatory alternatives. See, S. 1080, 97th Cong., 1st Sess. (1981); H. 3339, 97th Cong., 1st Sess. (1981).

[209] For comprehensive critiques of cost-benefit analysis as applied to health and environmental decisionmaking, see,

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a. Valuation Problems.

Perhaps the most troublesome of the problems that plague cost-benefit analysis is valuing benefits. While it is relatively easy to assign dollar values to the benefits of economic regulation, which for the most part are simply dollar savings to consumers,[210] placing dollar values on health and environmental benefits is much more controversial.[211] The heartiest debate centers on valuing the benefits of regulations that significantly reduce mortality and morbidity risks,[212] but the same arguments apply to attempts to reduce environmental, historical and aesthetic values to dollar amounts.[213]

Proponents of cost-benefit analysis argue that, however distasteful it appears at first glance, valuing lives and other important amenities is unavoidable, and it is done implicitly in thousands of everyday decisions.[214] Placing an explicit value on human life and other environmental entities can prevent regulatory decisionmakers from inconsistently placing a high implicit value on life in one case and a low value in another.[215] Forcing decisionmakers to be explicit about the

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209 M. Green & N. Waitzman, Business War on the Law (1979); P. Self, Econocrats and the Policy Process: The Politics and Philosophy of Cost-Benefit Analysis (1975).

[210] See, Lave, supra note 41, at 24-25.

[211] See, Lave, supra note 41, at 39; GAO Cost-Benefit Report, supra note 29, at 2; Rodgers, Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking, 4 Harv. Env't. L. Rev. 191, 198 (1980).

[212] See, Litan & Nordhaus, supra note 94, at 10-11; Merrill Draft, supra note 96, at ch.1, pp. 118-119.

[213] See, Lave, supra note 41, at 40; Senate Study on Federal Regulation, supra note 21, at 83.

[214] See, M. Bailey, Reducing Risks to Life: Measurement of the Benefits 15 (1980) [hereinafter cited as Bailey]; J. Mendeloff, Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy, 68-70 (1979); R. Smith, The Occupational Safety and Health Act: Its Goals and Its Achievements 34-6 (1976) [hereinafter cited as Smith].

[215] See, Bailey, supra note 211, at 15-16; Smith, supra note 211, at 34-36.

monetary values of life and aesthetics thus rids the analytical deck of a joker that can assume any value from zero to infinity in cost-benefit calculations and thereby justify any regulatory decision.[216]

Some attempts have been made to place explicit values on health and environmental benefits. The Federal Aviation Agency uses explicit values for human lives in their cost/benefit calculations for regulatory activities.[217] Other agencies, such as the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration and the Environmental Protection Agency, however, refuse to use explicit dollar values for human lives.[218] Regulatory analysts in those agencies leave such value judgments to the decisionmakers to make on a case-by-case basis.[219]

Many opponents of cost/benefit analysis question the morality of placing a value on human life, arguing that the very process belittles the intrinsic value of life.[220] Other opponents, ranging across the political spectrum from the Chemical Manufacturers Institute [221] to labor unions and environmental groups,[222] argue that it is impossible to

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[216] See, 1981 Regulatory Reform Hearings, supra note 20, at 234 (setting out the results of a survey of several agencies as to the value that they placed (either explicitly or implicitly) on human life).

[217] See, Chapter 3, at Notes 495-499. These attempts have been criticized. See, 1981 Regulatory Reform Hearings, supra note 20, at 247-49 (testimony of Mr. Lester Lave, economist, Brookings Institution); Survey of Ten
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[218] See, Chapter 3 at Notes 495-499 (NHTSA); Chapter 3 at Notes 745-750 (OSHA); Chapter 3 at Notes 1237-1242 (EPA).

[219] On occasion, these agencies will calculate an implicit value for human life in their cost-effectiveness analyses
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[220] See, Health, Safety, and Environmental Regulation: How Effective? 11 Am. Enterprise Inst. for Pub. Pol'y
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[221] See, CMA Regulatory Impact Policy Seeks Good Science, Omission of Life Value Costs, Chem. Reg. Rep. (BNA) 737 (Sept. 17, 1982).

[222] See, S. Rep. 97-284, supra note 6, at 81; Use of Cost-Benefit Analysis by Regulatory Agencies: Hearings
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derive a useful number for the value of a human life or an endangered species, even if it were desirable.[223] Critics of the theory of cost-benefit analysis argue that benefits analysis of health and environmental regulations is, at the extreme, "incoherent"[224] or "schizophrenic."[225] It cannot yield a single numerical value for things, such as significant mortality risks and risks to endangered species, that are not frequently traded in markets.[226] According to these critics,

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[217] Agencies, supra note 17, at 29 (criticizing the "human capital" approach to valuing lives).

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[219] of particular regulations. See, Chapter 3 at Notes 745-748.

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[220] Research Monograph (1981) (statement of Mr. Mark Green); S. Tolchin & M. Tolchin, Dismantling America 129-33 (1983).

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[222] Before the Subcomm. on Oversight and Investigations and the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 187 (1979); Green & Waitzman, supra note 144.

[223] See, GAO Cost-Benefit Report, supra note 29, at 1; Edwards & Sharkansky, supra note 3, at 197; Rodgers, supra note 208, at 197-8; Baram, supra note 125, at 483; Massachusetts Institute of Technology Center for Policy Alternatives, Benefits of Environmental, Health, and Safety Regulation 19 (1980) (prepared for the Senate Comm. on Govtl. Affairs, 96th Cong., 2d Sess.) [hereinafter cited as MIT Report].

[224] See, Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387, 388 (1981); 1981 H.R. 746 Hearings, supra note 11, at 690 (testimony of National Legal Aid and Defender Association).

[225] See, McGarity, Media Quality, supra note 99, at 172.

[226] The incoherence or schizophrenia of benefits analysis, insofar as it applies to significant mortality risks and valuable environmental entities, derives from the fact that the value of a thing can be measured either by the

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analysts should be content to quantify the impact of regulations on morbidity, mortality and environmental and aesthetic values without reducing those benefits to coin.

b. Valuing the Future.

Another valuation problem that plagues cost/benefit analysis is the rate that the analyst uses to discount future costs and benefits. The discount rate is an estimate of how much more a dollar in hand is worth than the promise of a dollar in the future. Most would agree that costs that will be incurred at some point in the future should be discounted to present value.[227] Discounting benefits, however, is more controversial.[228]

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[226] willingness of the purchaser to pay for it or the willingness of the seller to sell it. In the typical market context, these two measure yield the same dollar amount -- viz. the price at which the parties are willing to exchange the item. For objects for which we do not have markets, such as lives, the two measures need not yield the same result. For example, the price at which a person might sell his heart (under the willingness to sell measure) probably exceeds the price at which he is prepared to pay for it (under the willingness to buy criterion). Which test one adopts depends very much upon how one views the allocation of rights in society. See, McGarity, Media Quality, supra note 99, at 168-173.

Even if one adopts a "willingness to buy" measure for health and environmental values, the test will prove difficult in its application. Edwards & Sharkansky point out some of the problems with this test:

> First, preferences are not stable. . . . Second, the monetary values placed on the same benefit differ from policy to policy, providing little guidance for a general measure. . . . Third, consumers often make selections from ignorance on health, education, or other matters handled by professionals.

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[227] See, Meltsner, supra note 3, at 147.

[228] See, Baram, supra note 125, at 486; Rodgers, supra note 208, at 196; MIT Report, supra note 220; McGarity, Media

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Many health and environmental regulations are intended to benefit future generations. Yet a high discount rate applied to a strict cost-benefit analysis will obviously bias the analysis against future benefits.[229] It has been suggested that it may be inappropriate to discount benefits at all, because future generations may value health and environmental amenities even more than the present population.[230] Nevertheless, OMB has traditionally insisted that agencies use a very high discount rate of 10 percent in calculating the benefits of environmental regulations.[231] This means that

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226 Edwards & Sharkansky, supra note 3, at 188. See also, Kelman, Choice and Utility, 1979 Wis. L. Rev. 769. Sunstein, supra note 117, at 1276.

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228 Quality, supra note 99, at 188; Grubb & Whittington, supra note 56, at 35-36; Survey of Ten Agencies, supra note 17, at 24; Merrill Draft, supra note 96, at ch.1, p. 118.

[229] See, McGarity, Media Quality, supra note 99, at 188; Rodgers, supra note 208, at 198. Fisher, An Overview and Evaluation of EPA's Guidelines for Conducting Regulatory Impact Analysis in Environmental Policy Under Reagan's Executive Order: the Role of Benefit Cost Analysis (V. Kerry Smith ed. 1984)[hereinafter cited as Fisher]; Meltsner quotes the following poem, attributed to Kenneth Boulding:

> . . . the long term interest rate
> Determines any project's fate.
> At 2 percent the case is clear;
> At 3, some sneaking doubts appear;
> At 4, it draws its final breath;
> While 5 percent is certain death.

Meltsner, supra note 3, at 147.

[230] MIT Report, supra note 220, at 18. See also, Baram, supra note 125, at 486 n. 47; Rodgers, supra note 208, at 196 ("the decisionmaker who uses today's preferences to discount tomorrow's life is one whose impartiality might reasonably be questioned.").

[231] OMB's insistence upon a ten percent discount rate has been controversial. One regulatory official referred to the practice as "unethical," and a Congressman called it

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the benefits of a regulation that would prevent catastrophic loss in 50 years are very low in today's dollars and are therefore likely to be outweighed by even modest costs.[232]

While it seems clear that the discount rate is a useful tool for facilitating comparisons between present costs and future benefits, the actual discount rate used is entirely a policy question that should be left to upper level decisionmakers in the agencies. If upper level decisionmakers prefer not to establish a single discount rate for all regulatory decisions, they can of course, experiment with different discount rates. Regulatory analysts should, however, be very explicit about the discount rates that they use to ensure against giving the impression that discount rates are being manipulated to reach predetermined regulatory results.[233]

Regulatory analysts could help ensure against this potential misuse of discount rates by using two or more discount rates in every regulatory analysis document that addresses regulations with short-term costs and long-term benefits. Explicitly factoring several discount rates into intergenerational comparisons could reveal the sensitivity of the calculations to the discount rate. More importantly, the upper level decisionmakers' choice between several discount rates could reveal a great deal about how they value future generations.

c. Distributional Impacts.

Cost-benefit analysis is concerned with the efficient allocation of resources; it is not directly concerned with how resources are distributed in society. So long as a policy maximizes the total wealth to society, it matters not who the winners and losers are or how much wealth changes hands.[234]

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231 "ghoulish." New York Times, Apr. 17, 1985, at B28, col. 1.

[232] At a discount rate of 10% a dollar's worth of benefits 50 years from now is worth slightly less than a penny today. See, Discount Factor -- How Much One at a Future Date is Worth Today? (Copy on file with author).

[233] The Administrative Conference has recommended that regulatory analysis documents address "[t]he agency's

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[234] See, A. Kneese & C. Schultze, Pollution, Prices, and Public Policy 28 (1975); A. Freeman, R. Haveman & A.

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A politically accountable decisionmaker, however, must consider distributional impacts if he or she is successfully to remain on the job. For economic regulation in particular, distributional considerations can be the primary rationale for the regulatory program.[235] Distributional concerns also motivate environmental regulators to establish stringent media quality standards to protect sensitive populations.[236]

Nothing in cost-benefit analysis standing alone will bring distributional considerations to the attention of the decisionmaker. Although Executive Order 12291 requires RIAs to identify those who are likely to enjoy the benefits and bear the costs of regulations, many RIAs do not address distributional considerations.[237] Critics have charged that the Executive Order's expressed preference for cost-benefit analysis reveals a bias against distributional concerns that are important in the real political world.[238] Whether or not these charges are valid, the regulatory analyst will do his or her client a disservice if the analysis does not attempt to identify the winners and losers of a regulatory activity and assess its distributional impact.[239]

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233 methods . . . for discounting future costs and benefits. . . ." Recommendation No. 79-4, 1 C.F.R. § 305.79-4 (1984).

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234 Kneese, The Economics of Environmental Policy 81 (1973); Rogers, supra note 208, at 194. Hall Hearings, supra note 22, at 368 (testimony of Mr. James English, United Steelworkers); S. Rep. 97-284, supra note 6, at 92; Lave, supra note 41, at 24.

235 Distributional considerations, to a large extent, motivate the enactment of price controls, transportation regulation, and commodity price support programs.

236 See, McGarity, Media Quality, supra note 99, at 190. Lead Industries Association v. EPA, 647 F.2d 1130, 1141

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237 See, Grubb & Whittington, supra note 56, at 31; Chapter 3 at Note 215 (USDA-AMS, ASCS).

238 See, Grubb & Whittington, supra note 56, at 14. Cf. Sunstein, supra note 117, at 1277.

239 One prominent regulatory reform bill (S. 1080) would have required agency regulatory analysts to identify the

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d. Conclusion.

The considerable analytical deficiencies of cost-benefit analysis have led many observers of the regulatory analysis process to doubt its usefulness in guiding decisionmakers.[240] Agency technical staffs have resisted that form of analysis in several regulatory contexts, and only a very few agencies have standardized guidelines for evaluating the costs and benefits of their regulations.[241] Less pesimistic observers recognize that cost-benefit analysis cannot yield precise regulatory results, but they urge that the structure be retained for decisionmakers to use as one of several considerations in the decisionmaking process.[242] In this sense, cost/benefit

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236 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). See generally, E. Calabrese, Pollutants and High Risk Groups (1978).

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239 distributive aspects of a regulation in the regulatory analysis document. S. Rep. 97-284, supra note 6, at 92. See also, Luken & Johnson, supra note 20, at 16-17. Lave, supra note 41, at 25; Litan & Nordhaus, supra note 94, at 7. The Administrative Conference has recommended that regulatory analysis documents should address "[t]he agency's methods . . . for taking account of distributional effects arising under [its] selected methodology." Recommendation No. 79-4, 1 C.F.R. § 305.79-4 (1984).

[240] Costle, supra note 132, at 421; Leman, Some Benefits and Costs of the Proliferation of Analysis in Natural Resources Budgeting prepared for the 4th Annual Research Conference of the Association for Public Policy Analysis and Management (Oct. 23-30, 1982).

[241] The Environmental Protection Agency and the Department of Transportation have guidelines on cost-benefit analysis. See, EPA RIA Guidelines, supra note 184; DOT Handbook, supra note 184. The Department of Agriculture, the Food and Drug Administration, the Mine Safety and Health Administration, and the Occupational Safety and Health Administration are among those agencies that do not have such regulations. See, Hall Hearings, supra note 22, at 1470, 1658, 1987, 2014.

[242] Lave, supra note 41, at 25; GAO Cost-Benefit Report, supra note 29, at 7. Croke & Herlevson, supra note 10,

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analysis would simply be "a kind of organized common sense"[243] -- a useful tool in marshaling and analyzing information, but not a device for dictating precise regulatory results.[244] For example, cost benefit analysis can be useful in screening out bad options, rather than in identifying the best option. Others would limit cost-benefit analysis to the lesser role of aiding policymakers in defining priorities and structuring options.[245] Virtually no one argues that cost-benefit analysis should be the exclusive source of guidance for social regulation.[246]

Many analysts would argue that, rather than abandoning the entire analytical effort, agencies should employ a less ambitious analytical tool called "cost-effectiveness" analysis. Cost-effectiveness analysis accepts a predetermined nonmonetary goal and seeks the least cost device for obtaining that goal.[247] For example, when EPA analysts calculate the

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242 at 26; Edwards & Sharkansky, supra note 3, at 198; Hall Hearings, supra note 22, at 116-17 (testimony of Ms. Joan Claybrook, Public Citizen); 1981 Regulatory Reform Hearings, supra note 20, at 188-89 (testimony of the Business Round Table); Senate Study on Federal Regulation, supra note 21, at 84-85.

243 See, Kasper, Cost-Benefit Analysis in Environmental Decision-Making, 45 Geo. Wash. L. Rev. 1013, 1014 (1977). See also, S. Rep. 97-284, supra note 6, at 65; 1981 Regulatory Reform Hearings, supra note 20, at 210.

244 See, 1981 Regulatory Reform Hearings, supra note 20, at 188-89 (testimony of Business Round Table).

245 See, Nichols Interview, supra note 84; GAO Cost-Benefit Report, supra note 29, at 2.

246 Even the strongest proponents of cost-benefit analysis recognized that its limitations are so severe that it should not be the exclusive decisionmaking tool. See, 1981 Regulatory Reform Hearings, supra note 20, at 37 (testimony of Murray Weidenbaum, Chairman, Council of Economic Advisors) (cost-benefit analysis has not yet "been developed to the extent necessary to make it the exclusive basis for evaluating regulatory proposals"); 1981 H.R. 746 Hearings, supra note 11, at 560 (testimony

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247 See, Lave, supra note 41, at 19-21. Senate Study on Government Regulation, supra note 21, at 84; GAO

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cost-per-ton-of-pollutant-removed for various technologies in promulgating technology-based standards under the Clean Air Act and the Clean Water Act, they are engaging in a cost-effectiveness analysis.[248] Likewise, NHTSA uses cost-effectiveness analysis when it occasionally calculates the cost-per-life-saved for various regulatory alternatives.[249] In one case the goal is the removal of a pound of pollutant; in the other it is saving a life. The analysis allows the decisionmaker to compare different regulatory alternatives to the same goal in terms of their relative costs.

While cost-effectiveness analysis avoids many of the difficult valuation problems of cost-benefit analysis, it retains most of the other impediments to regulatory analysis. Moreover, it presumes that there is a single agreed upon goal for a particular regulatory effort, which, as we have seen, is rarely the case in the real world. In addition, if a regulatory effort is aimed exclusively at shifting wealth or at eliminating inequalities, it may entail few net costs, and cost-effectiveness analysis thereby becomes irrelevant to the problem.[250] Finally, cost-effectiveness analysis can focus the decisionmaker's attention too narrowly upon the costs to regulatees, to the exclusion of other important considerations.[251] Hence, although cost-effectiveness

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246 of the National Association of Manufacturers); 1981 Regulatory Reform Hearings, supra note 20, at 188-89 (testimony of the Business Round Table), and at 22 (testimony of Mr. James Miller, Administrator for Information and Regulatory Affairs, OMB).

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247 Cost-Benefit Report, supra note 29, at 21; Costle, supra note 132, at 417; Luken & Johnson, supra note 20, at 3. It is in this sense that Executive Order 12291 is more ambitious than its predecessor Executive Order 12044. The goal of the former is cost-benefit analysis; the goal of the latter was cost-effectiveness analysis.

248 See, Chapter 3 at Notes 1100-1109.

249 See, Chapter 3 at Notes 503-510. See also, Chapter 3 at Notes 216-219 (USDA-APHIS).

250 See, 1981 Regulatory Reform Hearings, supra note 20, at 552 (testimony of Department of Transportation).

251 According to one source:

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analysis is probably more useful than cost-benefit analysis, it should not be the exclusive determinant of regulatory action.[252]

9. Hidden Policy Agendas.

Comprehensive analytical rationality, as such, has nothing to say about how goals should be ranked.[253] Yet as we have seen in Chapter 3, many regulatory analysts in the real world have very definite opinions about what goals regulations should pursue and the relative priorities of those goals. To a large extent these preconceptions are inherent in the economic training that most regulatory analysts receive. Yet if policy analysts do have firm ideas about the quintessential political question of goal ranking and seek to implement those ideas, they are behaving as political actors and not as objective analysts, and their input should be treated as such. To the extent, however, that goal ranking becomes muddled in the instrumental operation of measuring alternative policies against preexisting goals, the political aspect of the regulatory analysis participation can be hidden behind a veneer of objectivity.

The large uncertainties that plague most attempts at regulatory analysis provide many opportunities for analysts to apply hidden policy agendas to regulatory problems.[254] As we

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> [I]dentification of the 'lowest cost' approach among several alternatives is rarely as simple as determining which is 'cheapest.' The alternatives that impose the lowest compliance costs on effective terms might also impose extremely high costs on state government; or an alternative that minimizes overall reporting burdens might also impose a disproportionately high burden on small businesses, or perhaps require a significant expansion of agency staff and funds.

Survey of Ten Agencies, supra note 17, at 25. See also, 1981 H.R. 746 Hearings, supra note 11, at 420 (testimony of Congress Watch).

[252] See, Senate Study on Federal Regulations, supra note 21, at 83.

[253] See, text accompanying notes 65-69, supra.

[254] See, Jenkins-Smith, supra note 168, at 90. Edwards & Sharkansky, supra note 3, at 9; Meltsner, supra note 3, at 253; Nager, supra note 139, at 41.

have seen, the choice between one assumption or inference and another, between a prediction at the high end or low end of a plausible range, and between a "liberal" or "conservative" mathematical model is usually a policy choice.[255] Regulatory analysts therefore have considerable discretion to apply policy preferences to the available data and analytical techniques to yield predictions at any point along a very large range. This in turn raises important questions of accountability for the policy choices that must necessarily guide the analytical effort.

a. Internal Accountability.

Agency regulatory analysts can use the regulatory analysis process to advance their own hidden policy agendas in the internal decisionmaking process.[256] By manipulating assumptions to aim predictions at the high or low end of the available range and by "soft-peddling" uncertainties, analysts can produce objective-looking analyses that considerably narrow the decisionmakers' effective range of choice. A good example is the well publicized dispute between OMB and EPA over whether the Administration should seek acid rain legislation.[257] In a meeting with the President, the Director of OMB suggested that EPA's proposed legislation would carry a price tag of $6,000 per fish saved. In the minds of EPA analysts this was an absurdly high number that could only have been derived by erring on the high side of virtually every possible assumption.[258] Moreover, the Director apparently did not attempt to characterize the uncertainties surrounding that number, and EPA had not prepared a "counter-prediction" for the meeting. While the President's own policy preferences may well have led him to kill the legislative initiative in any event, OMB's extremely slanted cost assessment, which of course reflected that agency's policy preferences, made the choice not to pursue the effort very easy, and it made the choice to seek legislation seem very unattractive.

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[255] Regulatory analysts in the agencies are well aware of the fact that policy considerations can dominate the output of the analytical exercise. Jennings Interview, supra note 14; Lange Interview, supra note 30; Felrice Interview, supra note 20.

[256] Professor Meltsner makes the following observation:

> The bureaucratic policy analyst, as a practical actor, can use his communications in any number of ways to serve both personal and collective purposes, like a lawyer he works for many clients, he can change arguments by highlighting different values. When he feels strongly about a policy there is very little stopping him from communicating his convictions.

Meltsner, supra note 3, at 253-54. See also, Benveniste, supra note 2, at 88-89.

[257] See, Patience and Precipitation, Wall Street J., Jan. 11, 1984, at 30, col. 1.

It should not, however, lightly be assumed that all agency regulatory analysts are Machiavellian manipulators intent upon foisting their policy preferences off on unsuspecting upper level policymakers. Most regulatory analysts regard themselves as professionals without particular axes to grind.[259] They are happy to apply the policy preferences of the upper level decisionmakers, and they actively urge upper level policymakers to communicate their policy preferences. When policy preferences are accurately communicated, most regulatory analysts feel constrained to apply them, whatever their individual views or perspectives.[260]

Still, as we have seen in Chapter 3, most regulatory analysts have a fairly well-defined view of good regulatory policy that is often informed by their own training in economics. When, as is often the case, policy communication is garbled, and the regulatory analysts and the technical staffs in the program offices are left to forge policy at lower levels, the analysts are likely to apply their own policy preference to their analyses in internal agency debates.

Upper level policymakers should be knowledgeable about the nature of regulatory analysis so that they can be aware of the uncertainties that becloud such analysis. They should understand how easily existing data and analytical tools can be manipulated to reflect individual policy preferences. Upper level policymakers should, for example, be very suspicious of single number estimates, and they should insist that the regulatory analysts attempt to characterize uncertainties and provide a range of plausible estimates. The analysts' policy preferences can be well revealed by the range of prediction.[261] So too, the choice of models can greatly indicate the analysts' policy preferences. To the extent that policy considerations must govern the choice among available models, upper level policymakers should be making these choices, not regulatory analysts.

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[258] See, Inside E.P.A., Sept. 30, 1983, at 1; Inside EPA, Mar. 23, 1984, at 1.

[259] See generally, Meltsner, supra note 3, at 284.

[260] Hitchcock Interview, supra note 7; Felrice Interview, supra note 20.

In addition to generally educating upper level decisionmakers about the pitfalls of analysis, internal accountability can be encouraged by structuring the decisionmaking process in a way that ensures that attempts by policy analysts to "fudge" the analysis to reflect their own policy preferences are detected in advance of the decision. For example, an adversarial process whereby different institutional actors with different policy outlooks must confront each other throughout the decisionmaking process could be a good tool for maximizing the upper level decisionmakers policy choices. Alternatively, the agency could structure the decisionmaking process so as to ensure frequent and effective policy communication between the lower level policy analysts and the upper level decisionmakers. Alternatives for structuring analysis into the decisionmaking process are discussed in more detail in Chapter 5.

b. External Accountability.

The ability of regulatory analysts to hide policy agendas in regulatory analyses also poses problems of external accountability.[262] If the policy preferences that inform the predictions are not made explicit, an unsophisticated public can be left with the impression that a particular regulatory result was dictated by facts and analysis, rather than policy. Because the decisionmaker's policy preferences remain hidden, he or she is not publicly accountable for his or her policy choices.

Clear communication between the upper level decisionmaker and the regulatory analysts can in this instance be disadvantageous to the public and other reviewers of the agency's decisions. The upper level decisionmaker can attempt to avoid public accountability for his or her policy choices by exerting subtle pressure on the agency analysts to hedge their predictions in one direction or another so that the decision appears better supported by facts and analysis than it really is. Rather than taking political responsibility for his or her policy determinations, the decisionmaker can claim that the decision was dictated by facts and analysis as revealed in the regulatory analysis document.

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[261] For example, in the pesticide example given previously, see note 181, supra, the fact that the analyst's "best estimate" was at the extreme low end of the 95% confidence interval spoke clearly to the nature of the analyst's policy preferences.

[262] See, Nager, supra note 139, at 41.

Given large uncertainties, regulatory analysis usually leaves considerable room for "fudging" the analysis without actually misrepresenting the available information or misapplying the available analytical tools.[263] At the extreme, the analysis becomes merely a post hoc rationalization for decisions reached on unarticulated policy grounds.[264] This can represent an abuse of policy analysis in two ways.

First, while it is altogether appropriate for policymakers to demand that the regulatory analysts who work for them use particular assumptions and models to err on the high or low side of impact projections,[265] there are limits to which honest analysis can be stretched to meet predetermined policy needs. In those cases in which the available information does permit some relatively confident projections, it would be inappropriate for the analyst to manipulate the analysis to suggest otherwise.[266] This disadvantage, however, is probably not too great, given the large uncertainties that plague most regulatory analysis and the considerable analytical leeway that results.

The more serious objection is not to the policy pressures that upper level decisionmakers exert upon regulatory analysts, but to the fact that the sources of these inexplicit policy preferences remain hidden. If the policies that dictate choices among assumptions and inferences and that move estimates toward the lower end or high end of the spectrum are not made explicit, the policymakers themselves cannot be held accountable to the public and other reviewing agencies. Explicit references to the policies that inform regulatory analyses is especially important for regulatory agencies, because ultimately the policies that drive the analyses must find their source in a congressional grant of policymaking discretion. Policymakers should not attempt to hide behind the veneer of "objective" policy analysis when the analysis itself must reflect subjective policy preferences.

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[263] See, Edwards & Sharkansky, supra note 3, at 197 ("By taking advantage of the ambiguities in benefit-cost analysis, practitioners can bend an analysis in any direction."); Meltsner, supra note 3, at 262. ("[The upper level decisionmaker] can play on the loyalty and feelings of his analyst to get him to rewrite, to fudge in slight ways so that the analysis is consistent with his preconceived preferences.")

[264] S. Rep. 97-305, supra note 12, at 45; Grubb & Whittington, supra note 56, at 42.

[265] See, Meltsner, supra note 3, at 73-74.

[266] See, Meltsner, supra note 3, at 75-76, 282.

10. Reliance on Contractors.

In Chapter 3 we discovered that many regulatory agencies rely heavily upon contractors for a large proportion of the information-gathering and data analysis that goes into their regulatory analysis documents.[267] For example, OSHA and EPA rely very heavily upon independent contractors for analytical work, while USDA "contracts out" very few studies. DOT contracts for basic research on the causes of accidents, but conducts most of its economic analysis in-house. EPA alone expends tens of millions of dollars on contracts aimed at providing information and analysis for regulatory analysis documents.[268] A single EPA regulatory analysis document may rely upon studies and analyses conducted by several different contractors. Conversely, many contracts are not regulation-specific, and may be used in the preparation of several regulatory analysis documents.[269]

Agency use of contractors for regulatory analysis work is often sensible, and even essential, from the agency's perspective. Agencies that deal with very technical questions of science and technology need expertise. Yet it could be very expensive for the agency to hire full-time employees with expertise on every subject that is germane to its rulemaking activities.[270] For example, an agency that promulgates standards that cut across many industries may find it inefficient to hire full-time specialists in every industry that it regulates.[271] The agency can simply contract out for particular expertise as particular cases arise; when the need for expertise is gone, the agency does not have to fire or (more likely) retrain an employee.

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[267] Meltsner, supra note 3, at 57-63.

[268] Hall Hearings, Supplement, supra note 22, at 1595-97.

[269] See, Conflict of Interest Hearings, supra note 8, at 16-17 (testimony of General Accounting Office).

[270] See, Conflict of Interest Hearings, supra note 8, at 767 (testimony of Joan Claybrook, then Administrator, National Highway Traffic Safety Administration).

[271] See, Survey of Ten Agencies, supra note 17, at 42; Conflict of Interest Hearings, supra note 8, at 13 (testimony of General Accounting Office), and at 689 (testimony of Barbara Blum, Deputy Administrator, EPA).

An additional advantage to "contracting out" is the fact that the agency can often obtain the services of the very best professionals in a particular field who may be unwilling to devote a career to the agency.[272] Relying upon contractors is also a convenient way to preserve the flexibility to "gear up" for resource-intensive rulemaking efforts as needed.[273] Finally, outside contractors can lend a patina of objectivity to an agency analytical effort that might otherwise be criticized as biased in favor of the agency's preconceived policy preferences.[274]

The heavy reliance of some agencies upon contractors for regulatory analysis information, however, raises two related concerns--(1) policymaking by consultants, and (2) conflicting loyalties and the possibility of bias.

a. Policymaking by Consultants.

Heavy reliance upon consultants can result in the effective delegation of important decisionmaking power to nonagency personnel. To the extent that agency decisionmakers are guided by regulatory analysis and to the extent that contractors are not closely supervised by agency personnel, the contractors can have a disproportionate impact on the agency's final decisions. The private consultants can, in effect, "make policy" for the government.[275]

Proponents of private consultants correctly respond that when private consultants suggest regulatory options that had not occurred to agency employees, they do not usurp agency discretion but only expand regulatory possibilities.[276] Similarly, to the extent that consultants merely assemble facts that they derive from other sources, they pose no threat to the agency's decisionmaking prerogatives. Yet consultants are also called upon to exercise professional judgment in interpreting facts, and they can be responsible for making the assumptions and drawing the inferences that underlie the predictions that inform regulatory analysis.

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[272] Hearings on Consultant Reform and Disclosure Act of 1981: Before the Subcomm. on Federal Expenditures, Research and Rules of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 57 (1981) [hereinafter cited as Consultant Reform and Disclosure Act Hearings] (testimony of Russell W. Richardson, Chairman, Committee on Contracting Out).

[273] Conflict of Interest Hearings, supra note 8, at 689 (testimony of Barbara Blum, Deputy Administrator, EPA); Consultant Reform and Disclosure Act Hearings, supra note 269, at 57.

[274] Survey of Ten Agencies, supra note 17, at 42; Consultant Reform and Disclosure Act Hearings, supra note 269, at 57 (testimony of Russell W. Richardson, Chairman, Committee on Contracting Out).

[275] See, Conflict of Interest Hearings, supra note 8, at 7 (testimony of Senator Herbert E. Harris); Senate Consultant Reform and Disclosure Act Hearings, supra note 269, at 19 (testimony of General Accounting Office).

In typical rulemaking activities the "facts" are not easily ascertainable, and the important decisions must turn upon assumptions and inferences that are ultimately heavily tinged with policy considerations as well as professional judgment. For many issues, the "fact" and the "policy" components of the decisions are are virtually inseparable. The contractor's report must necessarily reflect policy determinations as well as facts, and it is important to ensure that the policy being applied is the agency's and not the contractor's. The differences in the final analytical outcomes can be quite large.[277]

Agencies can go a long way toward solving the problem of policymaking by contractors. First, agency decisionmakers should, of course, refrain from delegating policymaking functions to consultants. Direct delegation probably does not occur in the government with any great frequency, and OMB guidelines already prohibit direct delegation.[278] All that remains is for agencies to enforce this prohibition.

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[276] See, Consultant Reform and Disclosure Act Hearings, supra note 269, at 56 (testimony of Mr. Russell W. Richardson, Chairman, Committee on Contracting Out).

[277] Swartzman provides an example of the wide disparities between predictions by private consultants and predictions by agency employees. He cites an example where a private consultant hired to do a regulatory analysis found the total cost of a noise pollution proposal to be $797,770. The benefits were estimated to be $424,887. The Illinois Environmental Protection Agency disputed these figures, and using their own analysis, determined that the cost would be $183,200 and benefits $1,602,000. Swartzman concludes that "[t]he disparity, due to different methods, different assumptions, and different data, was significant." Swartzman, supra note 119, at 61-63.

[278] OMB Circular No. A-120, Guidelines for the Use of Consulting Services 2 (April 14, 1980). ("Consulting services will not be used in performing work of a

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The more difficult problem lies in the subtle policymaking that is an unavoidable part of assessing the costs and benefits of proposed regulations. Agencies can probably best address this problem by insisting that agency employees responsible for administering consulting contracts closely supervise the contractors and their employees. Careful attention to the sources of information and the assumptions that guide the contractor can ensure that the contractor's policy preferences do not prevail when they differ from those of the agency. This in turn requires that the agency employees who administer the contracts have some familiarity with the technical issues and with the way in which policy preferences can drive the assumptions and inferences that go into technical reports. Finally, agency personnel, not consultants, should draft the agency's regulatory analysis documents.[279] In the final analysis the agencies themselves must take responsibility for ensuring that consultants do not usurp their policymaking prerogatives.[280]

Another effective solution to the problem of consultants making policy is intense public scrutiny of consultant reports. If the consultants make their assumptions and inferences plain, then the public should be capable of assessing their validity. To implement this solution, agencies would need to make the consulting reports used in the preparation of regulatory analysis documents part of the public record. Representatives of affected parties could then scrutinize the consultant reports, compare them to the agency's documents, and form their own conclusions about the independence of the agency's analysis.

b. Conflict of Loyalties and Bias.

A more serious concern is the suggestion that some consultants' reports may be biased because of conflicting

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278 policy/decision making or managerial nature which is a direct responsibility of agency officials.")

[279] This is apparently the practice in most regulatory agencies. See, Hall Hearings, supra note 22, at 247 (testimony of Mr. Frank Bendt, National Highway Traffic Safety Administration).

[280] Consultant Reform & Disclosure Act Hearings, supra note 269, at 54 (testimony of Russell W. Richardson, Chairman, Committee for Contracting Out).

consultant loyalties.[281] When an agency needs outside expertise on a technical question, it will naturally turn to a contractor with expertise in the area of interest. Often the professionals with the most relevant expertise are those who have acquired that expertise by working for the regulated industry.[282]

In rare cases, agencies have hired companies from the regulated industries themselves to undertake studies to be used in the preparation of regulatory analyses.[283] For example, a General Accounting Office study of 156 contracts undertaken by six regulatory agencies[284] to aid the agencies in the preparation of regulatory analysis documents during the Carter Administration found that eleven of those contracts were awarded to companies that were manufacturing products in the regulated industries.[285] Cooperative research efforts between agency and industry scientists and engineers pose similar questions of possible bias in the results of such efforts.[286]

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[281] See generally, General Accounting Office, Government Earns Low Marks on Proper Use of Consultants 21-23 (1980).

[282] See, Conflict of Interest Hearings, supra note 8, at 483 (testimony of Mr. Eckardt C. Beck, Assistant Administrator for Water and Waste Management, EPA).

[283] Two particularly questionable examples of EPA contracts for economic analysis to research companies that were wholly owned subsidiaries of important regulatees include: (1) a contract to the Exxon Research and Engineering Corporation to study better pollution control measures for offshore oil drilling that was awarded on the same day that its parent, the Exxon Corporation, began unlawfully discharging 450,000 of polluted water into the sea just east of Prudhoe Bay in Alaska; and (2) a $4,000,000 contract to Monsanto Research Corporation, a wholly owned subsidiary of the Monsanto Company, to study emissions from 62 industrial processes, including the production of chemical products. In the second contract, the research company submitted draft reports concerning a chemical for which the parent company was the leading United States producer to the parent company for review prior to submitting them to EPA. See, Neumann & Gup, The Regulators: A Study in Conflict, Washington Post, June 22, 1980, reprinted in Conflict of Interest Hearings, supra note 8, at 307.

[284] The agencies studied were the Environmental Protection Agency, the National Highway Traffic Safety Administration, the Department of Energy, the Federal Energy Regulatory Commission, and the Federal Communications Commission, the Consumer Product Safety Commission. Conflict of Interest Hearings, supra note 8, at 13.

Agencies have also hired contractors who were simultaneously rendering essentially the same services to private regulatees.[287] This "organizational conflict of interest" can result in the preparation of biased studies if the contractor fears that a study that reflects adversely upon the regulated industry will result in the loss of present or future consulting work from that industry.[288]

A less dramatic organizational conflict of interest can arise from the expectation of future employment, even if the government consultant does not accept jobs from the regulatee while it is doing government contract work.[289] For example, a contractor may take a government job with the expectation that the experience gained on the government job will be useful in securing future employment from a company in the regulated industry. This can pose a potential for conflict of loyalties that closely parallels the "revolving door" problem for government employees.[290]

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[285] The GAO provided the following two examples:

> EPA issued three contracts totalling $880,635 for cost analysis of air pollution control systems. A subcontractor on one of the projects is a trade association of companies that manufacture and supply 88% of all industrial air pollution control equipment in the United States. Another EPA contract was issued for $252,296 to perform a study of the best available technology for ore mining and effluent waste. The contractor has a wholly owned subsidiary to manufacture and market products emerging from its research.

Conflict of Interest Hearings, supra note 8, at 15.

[286] A cooperative research effort between NHTSA and the Motor Vehicle Manufacturers Association was challenged by Ralph Nader's Public Citizen under the Federal Advisory Committee Act. Although the agency maintained that it kept such cooperative efforts separate from its rulemaking activities, the agency terminated the program. Prod. Safety & Liab. Rep. (BNA) 830 (Oct. 28, 1983).

[287] Conflict of Interest Hearings, supra note 8, at 130.

[288] See, Hall Hearings, supra note 22, at 369 (testimony of Mr. James English, United Steelworkers).

[289] Basala Interview, supra note 189; Hall Hearings, supra note 22, at 369 (testimony of Mr. James English, United Steelworkers).

A final problem arises from the fact that a contractor's expertise may have been acquired through the services that one of its employees previously rendered to the regulated industry.[291] During the course of the prior employment, the employee may have acquired a "pro-industry" slant on the regulatory issues. While this does not technically raise problems of conflict of loyalties (unless the contractor's employee intends to return to the regulated industry), it nevertheless raises at least the possibility of bias in the contractor's final output.

The conflicts of loyalty that can arise from consulting arrangements relevant to regulatory analysis are not easily addressed. A few agencies have promulgated regulations addressing "organizational conflicts of interest" on the part of government consultants; others insert clauses into their standard contract solicitation notices; and still others screen for conflicts of interest on an ad hoc basis.[292] In addition, the Office of Federal Procurement Policy has recently promulgated a Federal Acquisition Regulation on this subject.[293] But most agencies still lack any effective regulations or guidelines on this subject.[294]

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[290] See generally, Johnson, Agency "Capture:" The "Revolving Door" Between Regulated Industries and Their Regulating Agencies, 18 U. Rich L. Rev. 95 (1983); Morgan, Appropriate Limits on Participation by Former Agency Officials in Matters Before The Agency, 1980 Duke L.J. 1, 36; Allen, The "Revolving Door" -- Should It Be Stopped?, 32 Ad. L. Rev. 383 (1980) (ABA Nat'l Conference on Fed. Reg. Panel Discussion); Note, The Fiduciary Duty of Former Government Employees, 90 Yale L. J. 189 (1980).

[291] 1981 Regulatory Reform Hearings, supra note 20, at 225, Hall Hearings, supra note 22, at 369 (testimony of Mr. James English, United Steelworkers).

[292] See, Hall Hearings, supra note 22, at 1598-1614 (EPA uses all three methods); id. at 2001 (OSHA relies upon

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[293] 48 C.F.R. Subpart 9.5 (1984).

[294] See, Hall Hearings, supra note 22, at 2020 (DOT relies upon staff personnel responsible for the analysis to

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Requiring consultants to set out clearly their assumptions and inferences and subjecting them to public scrutiny can go a long way toward reducing the possible adverse effects of organizational conflicts of interest.[295] Mandating that regulatory analysis document be drafted by agency employees, rather than by consultants, can similarly help ensure that agency analysts have independently assessed the data and analyses in the consultant report.[296] But more is probably necessary. Agency decisionmakers and the public will not know to keep a keen eye out for possible bias, if they are unaware of the fact that a potential organizational conflict of interest exists.

A somewhat more intrusive step would be to require potential contractors to state at the outset whether they have an organizational conflict of interest. This approach first requires an adequate definition of "organizational conflict of interest." The General Accounting Office has defined an organizational conflict of interest as "a situation where a prospective contractor has an interest in the product or industry being regulated, which could preclude it from providing a totally objective work product." A Federal Acquisition Regulation similarly defines the term to mean a situation in which the nature of the work to be performed under a proposed Government contract "may, without some restriction on future activities, . . . impair the contractor's objectivity in performing the contract work."[297] While these definitions are comprehensive, they leave a great deal of discretion to the

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292 contract requirements); id at 2483 (Federal Trade Commission uses contract requirements on an ad hoc basis).

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294 avoid conflicts of interest); Personal Interviews with Mr. J.E. Murdock, Acting Deputy Administrator and Chief Counsel, and Mr. Edward Faberman, Deputy Chief Counsel, FAA, DOT, May 18, 1983 [hereinafter cited as Murdock & Faberman Interview] (FAA has no guidelines on the subject of conflicts of interest).

[295] See, Conflict of Interest Hearings, supra note 8, at 263 (testimony of Ms. Joan Claybrook, Public Citizen).

[296] Some versions of regulatory reform legislation in the early 1980s required that agency employees draft regulatory analysis documents. See, S. 1080 § 622(f), S. Rep. 97-284, supra note 6, at 154.

[297] 40 C.F.R. § 9.501 (1984).

contracting agency. The kinds of relationships that could "impair a contractor's objectivity" can be defined with greater clarity by reference to the relationships that raise conflict of interest concerns in the real world.

A very narrow definition of "organizational conflict of interest" would include only existing contractual relationships with companies subject to regulation in the rulemaking initiative or subsidiaries or patents of such companies. A somewhat broader definition would include any contractors who have done work in the past for a regulated entity or a parent or subsidiary. An even broader definition would include contractors who have in their employ persons who have worked in the past for regulated entities, their parents or subsidiaries. Finally a very broad definition might include contractors who are seriously considering working for a company in the regulated industry in the future.

It would seem inappropriate to include companies who may in the future work for a regulated company. A determination on this issue at the outset of a rulemaking effort would require a great deal of speculation, and it would be very difficult after-the-fact to determine whether a contractor had violated the requirement.[298] More importantly, since most contracting companies would be unwilling to make the government their sole clients, the broad definition of "organizational conflict of interest" would almost certainly act in practice to deprive agencies of much needed expertise. Because it can probably be safely assumed that all regulatory analysis contractors will seek employment in regulated industries at some point in the future, it makes little sense to require potential contractors to commit themselves on the question at the outset.

It would seem appropriate, however, to include all of the other suggested contractors within the definition of organizational "conflict of interest" for purposes of revealing the source of the contractors' experience. While there is little support for the proposition that a company who has worked for the regulated industry or who has an employee who has worked for the the regulated industry thereby loses all objectivity, prior work experience is a relevant consideration in any contract for services. Agencies should be aware of this work experience at the time that contractors are being selected.

It may be going too far, however, to require contractors to poll every employee's past work experience for every job. Many contracting concerns are very large companies with hundreds of employees, most of whom will not be working on any given project. Therefore, the definition of "organizational conflict of interest" should be limited to contractor employees who are likely to be working on the project that is the subject of the contract.

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[298] See, Consultant Reform and Disclosure Act Hearings, supra note 269, at 83 (testimony of National Council of Professional Service Firms).

In sum, agencies should require a potential contractor for services to provide for use in preparing regulatory analysis documents a statement on "organizational conflict of interest," where the term is defined to include the contractor's current work for a regulatory entity, the contractors prior work for a regulatory entity, and any past work for a regulatory entity of any employee who is likely to be working on the project. Once a contractor is hired, this statement should be a matter of public record and should be attached to any document that the contractor prepares for the agency.

The current Federal Acquisition Regulation governing organizational conflicts of interest does not explicitly require that statements or findings concerning such conflicts be made public.[299] Some versions of regulatory reform legislation, however, require that a regulatory analysis document reveal the fact that consultants worked on studies prepared in connection with the document and include a description of the arrangements with any consultants.[300] EPA regulations require potential consultants on regulatory analysis documents to "list situations where they have taken a point of view on the subject of the contract within the preceding three years."[301] The Council of Environmental Quality regulations for preparing Environmental Impact Statements (EISs) require that the names and qualifications of contractors who worked on an EIS or background documents be identified in the EIS, even if their work may have been modified by the agency.[302] The regulations further require consultants to execute a disclosure statement disclosing any "financial or other interest in the areas of the project."[303] The Council on Environmental Quality interprets this term broadly to include the promise of future work on the project.[304]

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[299] 48 C.F.R. Subpart 9.5 (1984).

[300] See, S. Rep. 97-284, supra note 6, at 154.

[301] Conflict of Interest Hearings, supra note 8, at 642 (testimony of Ms. Barbara Blum, former Deputy Administrator, EPA).

[302] 40 C.F.R. § 1502.17 (1984). See also, Forty Questions, supra note 200, at 18034.

[303] 40 C.F.R.§ 1506.5(k)

[304] See, Forty Questions, supra note 200, at 18031.

In order to implement this requirement fairly and equitably, in advance of requesting contract services the agencies must assume the responsibility of identifying a list of the industries that are likely to be affected. A current Federal Acquisition regulation requires contracting officers to search government and other readily available sources for information on potential organizational conflicts of interest before requiring contractors to submit such information.[305] This is a sensible restraint upon government-imposed paperwork requirement for contractors, and it should contrive to guide agency contracting officers.

Some representatives of contractors have expressed concern that public disclosure of the nature of potential organizational conflicts of interest will result in the disclosure of consultants' confidential business information.[306] Apparently, contractors are concerned that their competitors will become aware of their clients and the nature of the work that they are performing for their clients. While there may be some legitimate interest in keeping such information from competitors, that interest is almost certainly outweighed by the agency's interest in maximizing public confidence in its regulatory analysis efforts and the public interest in knowing the backgrounds of companies that perform work for the government. If a contractor believes that disclosure of former consulting arrangements could be detrimental to its competitive position, it can simply refrain from bidding on the government contract. It is unlikely that such a disclosure rule will greatly deprive agencies of the services of qualified consultants.

The agencies could go further to ban the employment of consultants with a potential conflict of interest. This would seem unwarranted in the case of consultants who have worked in the past for regulated companies. While previous work for a company may have given a contractor a particular view of the world, one should not too readily conclude that the professionals who work for contractors are mere lackeys for regulated industries. Careful policing by the agency employees who are charged with administering contracts should be

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305 48 C.F.R. § 9506 (1984). ("When information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek it from within the Government or from other readily available sources.")

306 See, Consultant Reform and Disclosure Act Hearings, supra note 269, at 82-83 (testimony of National Council of Professional Services Firms).

sufficient to prevent contractor bias from creeping into their reports.

A better case for a complete ban exists when a contractor is currently doing work for a regulated industry. In this case a real conflict of interest may exist. On the principle that no person can serve two masters, agencies should be discouraged from hiring a contractor when it is currently performing work for a company that is possibly subject to regulation under the rule that the agency is contemplating on a subject matter that is relevant to the rulemaking effort. Similarly, contractors that the agency hires should be prohibited by contract from accepting employment with a potentially regulated company on a matter that is relevant to the rulemaking efforts.[307]

Finally, in order to mitigate the "revolving door" problem, agencies could consider including provisions in consulting contracts to prohibit consultants from performing similar work for the regulated industry for a specified period of time. Federal regulations impose similar restrictions upon government employees who leave the government to work for regulatees.[308] Such a prohibition could ensure against the possibility of unprofessional contractors biasing government reports in order to secure future employment with the regulated industry.[309]

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[307] The existing Federal Acquisition Regulation on organizational conflict of interest does not explicitly prohibit awarding contracts to consultants who are simultaneously performing similar services for the regulated industry. The regulation provides only that if the contracting officer decides that a particular consulting arrangement "involves a significant organizational conflict of interest," the contracting officer must prepare a current analysis "including a recommended course of action for avoiding, neutralizing or mitigating the conflict." The head of the contracting office then has discretion to adjust the terms of the consulting contract to mitigate the conflict of interest. 48 C.F.R. § 9.507(a)-(c) (1984).

[308] See, Office of the Secretary of Transportation, Responsibilities of the Government Employee and Special Government Employee Following Departure From Government Service, 49A C.F.R. §99.735-81 (1984); Department of Health & Human Services, Prohibitions Against Post-Employment Conflict of Interest, 45A C.F.R.

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[309] An example provided with the Federal Acquisition Regulation on organization conflicts of interest

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Whether a sufficient number of unscrupulous contractors exist to warrant such a restriction on future employment is an empirical question that is beyond the scope of this Report. Certainly, there have been instances of contractors using their government experience to open doors in private industry. It is, however, impossible to tell whether the contractor biased government reports as a guide pro quo for this access. Probably most companies would be unwilling to hire a consultant that was so easily persuaded to fudge its results. Moreover, a prohibition upon future employment could well discourage a substantial number of highly qualified companies from seeking government contracts in the first place. On balance, the disadvantages of such a prohibition appear to outweigh its limited advantages.

11. Retrospective Analysis.

The regulatory analysis office can enhance the accuracy of its predictions if it obtains feedback from the real world.[310] Retrospective analysis of the actual impact of regulatory requirements on the regulated industry and the intended beneficiaries can provide effective feedback to the analyst.[311] Retrospective analysis is also a tool for evaluating the effectiveness of existing regulations, a function that Executive Order 12291 explicitly requires agencies to undertake.[312] Over time, retrospective analysis

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308 §737-35-1401 (1984); Department of Interior, Prohibitions Affecting Former Government Employees, 43A C.F.R. § 20.735-60 (1984).

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309 indicates that the regulation may impose such a revision:

> An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of

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[310] See, Meltsner, supra note 3, at 269; Majone, The Uses of Policy Analysis, in The Future and the Past: Essays on Programs and the Annual Report 1976-1977 207 (1978).

[311] Meltsner, supra note 3, at 70, 273.

[312] Exec. Order No. 12, 291, supra note 82, at §3(i).

could be useful in evaluating the entire regulatory analysis enterprise. If the regulatory analyst's predictions are always far off base, an agency might decide to devote fewer resources to the endeavor.

Interestingly, regulatory analysts, who are in the business of analyzing the work of others, rarely evaluate their own work.[313] The agencies that were studied in connection with this report devoted very few resources to retrospective evaluations of their regulatory analysts' previous predictions. OSHA, FAA and the agencies in USDA conduct very few, if any, retrospective analyses.[314] Some of the program offices in EPA are required by statute to reevaluate rules periodically, but these evaluations do not focus to any great extent upon the predictions made in past regulatory analysis documents.[315] Only the National Highway Traffic Safety Administration undertakes routine retrospective analyses of its predictions in its past rulemaking efforts.[316]

Since uncertainties in the subject matter virtually guarantee inaccuracies in analytical projections, it is not surprising that regulatory analysts are hesitant to evaluate their own efforts. As one EPA analyst candidly observed: "How is my career going to be advanced by doing a study that shows that three years ago the agency made a wrong prediction. It is not in my best interest."[317] In most agencies analytical resources are strained by the day-to-day work on new rulemaking initiatives.[318] Still, the very few retrospective analyses

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309 performance and for a reasonable period thereafter.

48 C.F.R. § 9.509(i) (1984).

[313] See, Meltsner, supra note 3, at 273.

[314] See, Chapter 3 at Notes 742-744 (OSHA); Chapter 3 at Notes 480-484 (FAA).

[315] See, Chapter 3, at Notes 1211-1218.

[316] See, Chapter 3, at Notes 477-484.

[317] Telephone Interview with Mr. Alexander Cristofaro, Air Branch Chief, Regulatory Policy Division, Office of Policy Analysis, Office of Policy, Planning and Evaluation, EPA, May 24, 25, 1984 [hereinafter cited as

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[318] See, Cristofaro Interview, supra note 314; Luken Interview, supra note 84; Ruhter Interview, supra note

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that have been done in the past indicate that agencies could profit greatly from devoting some resources to evaluating the accuracy of past analytical efforts. Retrospective economic impact studies indicate a general trend toward overestimating compliance costs, sometimes to a fairly large degree.[319] Retrospective benefit studies are virtually nonexistent, in large part because very few benefit studies have been undertaken in the past.

One problem that has plagued the few retrospective efforts that have been undertaken is the difficulty in determining after-the-fact exactly what monies the regulatees did expend in complying with a particular rule. Corporate accounting tools are not designed to facilitate the measurement of compliance costs.[320] The problem is complicated further by the fact that many regulations are performance-based and therefore do not require the adoption of any particular compliance scheme. For example, a regulatee may add on an "end-of-pipe" technology for pollution control, or it may implement design changes to new or existing facilities. While the expense of the former response is probably attributable entirely to a pollution control regulation, the company may adopt the latter option for many reasons, and the costs may not entirely stem from the pollution control regulation.

Despite these accounting problems, retrospective analysis can be very useful in assessing the value of regulatory analysis and in preventing past analytical errors to be perpetuated in the future. While it would probably not be cost-effective for an agency to conduct extensive retrospective analysis for all of its major rules, it should set aside enough analytical resources to undertake retrospective analysis for one or two future regulatory analyses each year. Most agencies devote some analytical resources to program evaluation, and in recent years regulatory analysis has assumed an important role in the programs of most regulatory agencies. Agencies could

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317 Cristofaro Interview]. See also, Edwards & Sharkansky, supra note 3, at 132.

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318 84; Segal Interview, supra note 20; Wentzler Interview, supra note 51.

[319] See, Senate Study on Federal Regulation, supra note 21, at 84 (OSHA vinyl chloride standard). Hall Hearings, supra note 22, at 121 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA).

[320] See, Chapter 3, at Notes 480-484 (FAA).

probably follow NHTSA's example and fold retrospective analysis into their general program evaluation horizons.

12. Deadlines and Delay.

For any decisionmaking body there is always a "tension between timeliness and analysis."[321] Regulatory analysis takes time, but time can mean delay for agency rulemaking managers in the program offices who complain of "paralysis by analysis."[322] Hence, the potential for delay is another source of conflict between the regulatory analysis staff and the program office staff.

Regulatory analysis can also be used as a crutch for putting important decisions off until another day.[323] The need for further study and analysis can serve as a convenient conflict-avoidance device.[324] Issues that cannot be amicably resolved can be put off pending further analysis that may eliminate the conflict.[325]

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[321] Telephone Interview with Mr. Stuart Sessions, Acting Director, Regulatory Policy Division, Office of Policy Analysis, Office of Policy, Planning and Evaluation, EPA, May 29, 1984. See also, Merrill Draft, supra note 96, at ch.1, p. 115; Storing, supra note 68.

[322] Hall Hearings, supra note 22, at 533 (testimony of Mr. Jerry Hill, former Assistant Secretary, USDA); Beliles Interview, supra note 161; Personal Interview with Mr. Rob Wolcott, Special Assistant to the Deputy Administrator, EPA, June 27, 1984 [hereinafter cited as Wolcott Interview]; Telephone Interview with Mr. Daniel Fiorino, Acting Director, Regulation and Enforcement Management Division, Office of Standards and Regulations, Office of Policy, Planning and Evaluation, EPA, February 8, 1983 [hereinafter cited as Fiorino Interview]; Felrice Interview, supra note 20; Telephone Interview with Mr. Robert Ajax, Standards Development Branch Chief, Emissions Standards and Engineering Division, Office of Air Quality Planning and Standards, Office of Air and Radiaton, EPA, July 13, 1984. Independent agencies have used the possibility of delays in rulemaking initiatives as a reason for urging Congress not to require them to

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[323] See, Meltsner, supra note 3, at 293; Lindblom, supra note 3, at 108.

[324] Ajax Interview, supra note 319.

[325] Wolcott Interview, supra note 319.

An occasional complaint of regulatory analysts in the agencies is that deadlines for promulgating rules force them to devote insufficient time to their analytical efforts.[326] For some regulatory efforts, such as regulations accompanying quarantine activities of the Animal and Plant Health Inspection Service,[327] time constraints make any significant analytical effort impossible. Attempts in such cases to bring comprehensive analytical rationality to bear on the decision must necessarily be cursory and informal. Recognizing this reality, Executive Order 12291 exempts any regulatory effort that responds to an emergency or for which compliance "would conflict with deadlines imposed by statute or by judicial order."[328]

The complaint, however, appears to go farther than the narrow problem of regulatory actions that must be taken in haste. Some analysts claim that there simply is not enough time in the normal rulemaking life cycle to prepare an adequate regulatory analysis. This may be largely a problem of insufficient analytical resources, a problem that will be discussed in the next section of this Chapter. To some extent, however, this may be a problem of the timing of the preparation of regulatory analysis documents.

All regulatory efforts face time constraints. There is little reason to believe, however, that the analysts need more time than the technical staff in the program office. Most timing problems probably stem from the fact that the services of the regulatory analysts are not always requested until late in the process after much of the technical work on the rule is completed. Having completed the bulk of its work, the technical staff becomes restless to get the rule out and generates pressure on the analysts to finish their analytical efforts as soon as possible. Operating under these time constraints, the analysts believe that they cannot do an adequate job. Too often, they must make "back of the envelope" predictions based upon little information and very little analysis.[329] Structuring the decisionmaking process so that regulatory analysis becomes involved at a very early stage and

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322 prepare regulatory analyses to accompany rules. See, 1981 H.R. 746 Hearings, supra note 11, at 211.

[326] Edwards & Sharkansky, supra note 3, at 141; Peak Interview, supra note 20.

[327] See, Chapter 3 at Notes 93-96.

[328] Exec. Order No. 12,291, supra note 82, at § 8(a)(1), (2).

[329] See, Edwards & Sharkansky, supra note 3, at 185.

can play a role in setting research agendas and allocating resources could help alleviate this aspect of the timing problem.[330] Suggestions for structuring analysis into the regulatory decisionmaking process will be discussed in more detail in Chapter 5.

13. Insufficient Analytical Resources.

Not surprisingly, one of the most frequent impediments that agency regulatory analysts have identified is the paucity of resources that agencies currently devote to analysis.[331] Other, less partial, observers have also identified inadequate resources as a significant impediment to regulatory analysis.[332] While this criticism must be taken with a grain of salt, no analysis is as thorough as it could be. As Professor Lindblom has observed, "A policymaker, whether an individual or an organization, will become exhausted long before the analysis is exhausted."[333] Hence, the question whether agency analytical efforts are receiving adequate resources is, like most resource issues, a question of tradeoffs. As a preliminary matter, however, it is useful to devote some attention to the resources that are currently being devoted to regulatory analysis in the agencies.

a. Current Analytical Resources.

The nonindependent regulatory agencies that are subject to Executive Order 12291 devote substantial resources to the task of regulatory analysis. Surprisingly few efforts, however, have been made to determine exactly how many resources regulatory analysis consumes. The most systematic attempt to answer this question was a questionnaire that the House Judiciary Committee directed to fifteen agencies in connection with its hearings on regulatory reform legislation.[334] The questionnaire elicited responses of varying quality and precision from the agencies, and the results are summarized to the extent that they can be broken down and compared, in Table 4-1.

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[330] See, S. Rep. 97-284, supra note 6, at 91.

[331] See, Fiorino Interview, supra note 319; Kranidas Interview , supra note 23; Peak Interview , supra note 20; Shapiro Interview, supra note 84; but see, Segal Interview, supra note 20 (agency probably has enough policy analysis resources at the moment).

[332] See, Survey of Ten Agencies, supra note 17, at 51; 1976 IIS Report, supra note 20, at 8, 77.

[333] Lindblom, supra note 3, at 14. See also, Meltsner, supra note 3, at 154; 1976 IIS Report, supra note 20, at 77; Survey of Ten Agencies, supra note 17, at 18. (Resource constraints can force "a trade-off between the consideration of more alternatives and the development of detailed quantified and reliable cost and benefit estimates with regard to fewer alternatives.")

Other, unsystematic attempts to estimate the resources devoted to regulatory analysis have yielded similar results, although their accuracy is open to question. The Congressional Budget Office has made a gross estimate that the average Regulatory Impact Analysis for major rules will cost $100,000.[335] The General Accounting Office surveyed 38 regulatory analyses prepared by eight departments and agencies pursuant to Executive Order 12044 during the Carter Administration and found the average cost per analysis to be $212,000.[336] GAO cautioned that this should be regarded as a lower bound for the costs.[337] The costs for RIA preparation under Executive Order 12291 are probably considerably higher, because that Executive Order requires benefits analysis as well as costs analysis. A GAO Survey conducted in 1983, of the costs of RIA preparation in six major agencies yielded the information in Table 4-2.[338]

b. Adequacy of Existing Resources.

Whether the agencies are spending adequate amounts on their analytical efforts depends upon what society is getting in return for those resources and upon how society could otherwise be spending them. On these questions there is, of course, room for differences of opinion. Some observers believe that a two million dollar regulatory analysis is worth the expense if it is instrumental in persuading an agency to adopt a standard that saves the regulated industry and, indirectly, consumers fifteen million dollars.[339]

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[334] Hall Hearings, supra note 22, at 1178.

[335] S Rep. 97-284, supra note 6, at 90.

[336] 1982 GAO Report, supra note 3, at 19.

[337] 1982 GAO Report, supra note 3, at 19.

[338] 1982 GAO Report, supra note 3, at Table 1.

[339] See, Portney The Benefits and Costs of Regulatory Analysis in Environmental Policy Under Reagan's Executive Order: The Role of Benefit Cost Analysis (V. Kerry Smith

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Other observers believe that resources are being wasted on "gold plated studies" that can have very little real impact in a regulatory world that is dominated by the pulls and tugs of political forces.[340] Pointing to all of the impediments to analysis, they argue that a good analysis will count for very little and a poor or biased analysis can work positive harm on society.[341] Many have therefore concluded that regulatory analysis requirements are not "cost effective."[342]

Some observers have pointed out that while the Office of Management and Budget has largely been responsible for increasing the analytical burdens upon the agencies in the last several years, that agency has not recommended that they be given additional resources to do the required analyses.[343]

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339 ed. 1984) [hereinafter cited as Portney] (alluding to "the great likelihood that regulatory impact analysis will cover its costs, if not return it several times over"); Miller, Lessons of the Economic Impact Statement Program Reg. 14, 18 (July/Aug. 1977); S. Rep. 97-284, supra note 6, at 90 (committee determination that for major rules the costs of regulatory analysis are more than outweighed by the potential benefits in increasing the effectiveness of regulation, reducing compliance costs, and ameliorating detrimental impacts of regulation).

[340] See, Hall Hearings, supra note 22, at 52 (testimony of Ms. Joan Bernstein, former General Counsel, EPA); id. at 109 (testimony of Ms. Joan Claybrook, former Administrator, NHTSA).

[341] See, Grubb & Whittington, supra note 56, at 50 ("given the complexities of many environmental issues, analytical resources, including those of cost-benefit analysts -- would often be better spent on policy and program design rather than ex post analyses of a few regulations.").

[342] See, 1981 H.R. 746 Hearings, supra note 11, at 105 (testimony of the American Bar Association) (ABA is not "entirely sanguine about the extent or current knowledge of the usefulness of such analyses in all cases, especially viewed against their costs"); Regulatory Flexibility Act Oversight Hearings, supra note 26, at 98 (testimony of Mr. Bevis Longstreth, Commissioner,

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[343] See, GAO Cost-Benefit Report, supra note 29, at 29-30; Luken Interview, supra note 84. Role of OMB in

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They conclude that the real motivation behind the analytical requirements is to force agencies to shift existing resources out of regulatory programs and into analysis, thereby stemming the flow of regulations.[344] This cynical motivation for the use of analysis, if true, does little to enhance the status analysis among agency employees, regulatees and the general public.

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342 Securities and Exchange Commission) (The Regulatory Flexibility Analysis "simply has not been cost-effective in our view").

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343 Regulation Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 70, 5 (1981) [hereinafter cited as Role of OMB in Regulation Hearings] (statement of Congressman Albert Gore).

344 See, Hall Hearings, supra note 22, at 109 (testimony of Ms. Joan Claybrook, former administrator, NHTSA) ("The subtle hypocrisy of insisting on cost and benefit analysis while at the same time reducing or eliminating a government agency's ability to gather the necessary information is not unnoticed."); id. at 52 (testimony of Ms. Joan Bernstein, former General Counsel, EPA); Role of OMB in Regulation Hearings, supra note 340, at 5 (statement of Congressman Albert Gore). ("The juxtaposition of increasingly rigid demands for analysis and decreased analytical resources cannot help but lead to the conclusion that this administration's real goal is to simply stop regulation.")

B. Impediments to Communicating Analysis.

At least half of an analyst's job is to communicate effectively the results of his or her analytical efforts. The starting point is obviously the analyst's personal communications skills, a topic that is beyond the scope of this Report. This section of the Report will therefore focus exclusively upon institutional impediments to policy communication.

1. Intra-agency Policy Management.

Since regulatory analysis is explicit about policy goals, upper level decisionmakers can use the regulatory analysis process to monitor the recommendations of lower level technical staff for adherence to management's view of correct policy goals. For regulatory analysis to become an effective policy management tool, however, the upper level decisionmakers must communicate to the regulatory analysts a clear sense of the priority ranking of the agency's competing policy goals. Likewise, the regulatory analyst must be able to communicate to upper level decisionmakers the extent to which each of the regulatory options implements their policy preferences.

Agency regulatory analysts frequently complain that they do not always obtain a clear picture of the policy preferences of upper level decisionmakers. For example, for several years, the Secretary of the Department of Transportation adopted a very decentralized approach to regulatory decisionmaking, delegating most policymaking to the heads of the Operating Administrations within the Department. The Secretary made few detailed policy declarations, and the Office of the Secretary did not scrutinize regulatory analysis documents especially carefully for adherence to Departmental policy goals. When a new Secretary decided to exercise a stronger policymaking role in transportation safety matters, the Department experienced some difficulty in communicating the new policy preferences to the Operating Administrations. In the end, regulatory analysis proved the best vehicle for this policy communication, but only after many painful remands of rules and analyses to the administrations and one or two instances in which the Secretary simply abandoned the rulemaking analysis process in the Operating Administrations and drafted portions of the regulatory analyses and rulemaking documents in the Office of the Secretary.

To some extent, the impediments to using regulatory analysis as a policy management tool are probably attributable to the inability or unwillingness of the upper level decisionmakers to be explicit about they way in which they rank competing policy goals. To the extent that this is true, there are no easy procedural or structural solutions to the policy management problem. Little can be done to force unwilling policymakers to manage policy. But the fact that the problem seems to afflict large agencies, where communication must necessarily follow relatively formal paths, more than smaller agencies, where communication can occur frequently and informally, indicates that the failure of policy communication may be addressed by improvements in the structure of the decisionmaking process, a topic that will be discussed in Chapter 5.

2. Communication With Reviewing Institutions and the Public.

Regulatory analysts must also communicate with reviewing institutions like OMB and Congress. Executive Order 12291 ensures that the results of the agency's regulatory analysis efforts for major rules will be communicated to OMB.[345] Indeed the existing process for communicating analysis to OMB and for conveying OMB policy preferences back to the agencies has generated a wealth of (sometimes acrimonious) policy communication.

While there is very little doubt that effective policy communication between the nonindependent agencies and OMB takes place on a regular basis, some have suggested that the contents of this communication be placed in the public rulemaking record. The Administrative Conference has recommended that Congress not require that all oral communication between the White House and the nonindependent agencies be reduced to writing and placed in the rulemaking record.[346] Many agencies, however, have adopted the practice of placing written communications from OMB in the public record, and OMB has apparently acquiesced in this practice.[347]

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[345] Exec. Order No. 12,291, supra note 82, at § 3(e), (f).

[346] Administrative Conference Recommendation No. 80-6, 1 C.F.R. § 305.80-6 (1984). See, Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980).

[347] See, e.g., Personal Interview with Mr. Joseph Cannon, formerly Associate Administrator for Policy and Resource Management, Radiation, EPA, May 18, 1984 [hereinafter cited as Cannon Interview]; Hall Hearings, supra note 22, at 1563 (EPA).

The practice is a good one for two reasons.[348] First, it helps insulate agencies from charges that OMB has usurped their decisionmaking powers. The protection is not complete, however, because it is still possible for OMB to say one thing in writing and another over the telephone. Still, placing written communications in the rulemaking record can help inform the public of the extent to which an agency's policy adheres to or varies from the Administration's policy as articulated by OMB.

Second, placing OMB written communications in the rulemaking record helps make OMB, and ultimately the President, accountable to the public.[349] If the President has a particular policy agenda, the regulatory analysis document is an effective way of communicating that policy to the nonindependent agencies. The President should, however, be responsible to the public for the consequences, good or bad, of his agenda.[350] Placing written communications in the rulemaking record can make the public aware of the sources of public policy in regulatory decisionmaking.

No formal mechanisms exist for communicating regulatory analysis to Congress. Like any other member of the public, a congressman can obtain a copy of the agency's RIA for a major rule, but unless the congressman has some special reason to know about the rulemaking effort and the existence of the RIA, the communication is not likely to occur. The General Accounting Office has suggested that executive summaries of some RIAs should be routinely sent to appropriate congressional committees for review and comment as they are completed and publicized.[351] While full implementation of this suggestion might serve merely to flood crowded Congressional committee offices with unread regulatory analysis documents, it could be accomplished at little expense, and it might help to keep interested committees and subcommittees abreast of important rulemaking efforts.

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[348] See, 1981 Regulatory Reform Hearings, supra note 20, at 142 (testimony of American Bar Association) (arguing that written, but not oral, communication be placed in the rulemaking record).

[349] See, H. Rept. 97-435, supra note 103, at 54; 1982 GAO Report, supra note 3, at 4, 53.

[350] See, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce on the Role of OMB in Regulation, 97th Cong., 1st Sess. 11 (1981) (testimony of Mr. George Eads).

[351] GAO Cost-Benefit Report, supra note 29, at v.

Chapter 3 revealed that many regulatory analysts in the agencies are of the opinion that one of the primary benefits of regulatory analysis is to enhance the quality of public participation in the rulemaking process.[352] Regulatory analysis can only perform this laudable function if it is accessible to the public. And regulatory analysis is accessible only to the extent that the sources of data that go into the analyses are clearly identified. As we have seen, regulatory analysis documents rarely contain original research; they generally draw upon and collect the work of others. On some occasions, however, the regulatory analysis documents do not clearly reveal the sources of the information upon which they rely.[353] It is difficult to see how regulatory analysis can enhance the quality of public participation in the rulemaking process if does not identify its sources of information. Agency analysis should therefore take care in preparing regulatory analysis documents to identify the sources of all information, including the consultants who took part in the analytical effort. Although some sources of information, such as telephone surveys, may not have the respectability of a published scientific report, they should still be identified and made a part of the public record. Interested members of the public should be permitted to examine the entire technical and economic basis for a rule and form their own opinions about the validity of the conclusions that the regulatory analysts drew. These opinions can in turn be communicated to the agency during the public comment period.

While intensely interested members of the public will be willing to purchase and read the sometimes bulky documents, other interested members of the public will not have sufficient time and resources to purchase and read regulatory analysis documents. Like the busy executive, the typical interested citizen can most effectively absorb a brief 5-10 page executive summary that sets out the results of the agency's analytical efforts in tabular form. Charts and tables can most effectively set out the agency analyst's predictions. Citizens with a continuing interest in the agency's analysis should, of course, be provided a convenient opportunity to read the document in full.

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[352] See, Chapter 3, Notes 703-706 (OSHA).

[353] See, note 150, supra.

C. Impediments to the Use of Analysis.

After the regulatory analysts have prepared a regulatory analysis and communicated it to the agency decisionmakers, considerable institutional impediments to the effective use of the analysis in the decisionmaking process still remain. To a large degree the impediments to the use of regulatory analysis in the decisionmaking process stem from the two different rulemaking cultures described in Chapter 1. Technical staff in the program offices and some upper level decisionmakers are resistant to the use of analysis in regulatory decisionmaking. In some cases "political" considerations (as opposed to "policy" considerations) severely impede the extent to which agency decisionmakers can use analysis. In other cases the agency's statute precludes explicit use of analysis in the decisionmaking process. Finally, the fact that analysis can be used for purposes unrelated to bringing comprehensive analytical rationality to bear upon regulatory problems hinders its effective use in situations in which it can be used legitimately to yield better decisions.

1. Technical Staff Resistance to Analysis.

The members of the technical staff who share a techno-bureaucratic perspective will generally not be receptive to the use of regulatory analysis in regulatory decisionmaking.[354] Many agency analysts view this resistance as the single most important impediment to the effective use of regulatory analysis in regulatory decisionmaking.[355]

Many technical personnel in the program offices of the agencies studied in connection with this Report believe that analysis is by-and-large a waste of agency time and resources. They feel both superior to and threatened by the analysts. Their feelings of superiority stem from their belief that the analysts have very little firm support for their predictions.

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[354] See generally, Lindblom, supra note 3, at 13.

[355] See, Luken Interview, supra note 84; Campbell Interview, supra note 84; Telephone Interview with Ms. Miriam Bender, St. Louis University Law School, formerly Office of General Counsel, USDA, March 15, 1984 [hereinafter cited as Bender Interview]; Basala Interview, supra note 189.

Regulatory analysis is rarely "scientific" in the sense that an engineer or health scientist understands that concept. Regulatory analysis to them is a loose amalgam of cost and benefit projections stitched together out of unscientific surveys of the regulated industries and resting on unsupportable assumptions. The attitude of the technical staff is often: "When all is said and done, the hard scientific and engineering studies and political considerations will dominate the regulatory analyses, and the agency will wind up in about the same place, whether or not it spends resources on the analytical effort."[356]

Ironically, the technical staff in the program offices also feel threatened by analysis, because it can represent a direct challenge to status quo approaches to regulatory problem solving that the technical staff has historically established and dominated. A good analyst is always asking questions, challenging assumptions, and suggesting new options. Moreover, the analyst is not beyond challenging the basic underlying premises for the entire regulatory program. Finally, to the extent that upper level decisionmakers give credence to the analysts and follow their advice, the technical staff's traditional dominance of the decisionmaking process is threatened.[357]

This resistance of program office personnel to analysis is not unlike the resistance that the offices responsible for preparing Environmental Impact Statements (EISs) in the early 1970s encountered in agency program offices. Like the RIA, the EIS was meant to be a comprehensive analytical document, and it was intended to change fundamentally agency thinking processes. From its inception, observers of the EIS confidently predicted that resistance in the program offices would doom the analytical effort.[358] Although more recent reviews of that

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[356] See, Chapter 3, at Notes 1416-1418.

[357] Another source of technical staff resistance to regulatory analysis is the strong perception of many that analysts and upper level decisionmakers use the regulatory analysis process to further substantive ends unrelated to rational decisionmaking. This source of

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[358] Professor Sax suggests five lessons for procedural reform of administrative decisionmaking: (1) don't expect hired

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process are mixed, many current observers believe that NEPA has had a profound substantive impact on agency decisionmaking, despite the early resistance of development-oriented personnel in the agency program offices.[359] Whether regulatory analysis is capable of overcoming technical staff resistance probably depends on the inherent limitations of analysis discussed in this chapter, the commitment of upper level decisionmakers to comprehensive analytical rationality, and the way that regulatory analysis is structured into the decisionmaking process.

2. Resistance of Upper Level Decisionmakers.

While the greatest institutional resistance to comprehensive analytical rationality usually comes from the program office staff, agency analysts also complain of resistance on the part of upper level decisionmakers.[360] Upper level resistance to analysis, however, is not easily analyzed. The upper level decisionmakers may be unfamiliar

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357 resistance will be discussed in more detail in Subsection 4, below.

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358 experts to undermine their employers; (2) don't expect people to believe legislative declarations of policy; (3) don't expect agencies to abandon their traditional friends; (4) expect agencies to back up their subordinates and professional colleagues; (5) expect agencies to go for the least risky option (where risk means chance of failing to perform their mission). Sax, The (Unhappy) Truth About NEPA 26 Okla. L. Rev. 239, 248 (1973). See also, Cramton and Berg, supra note 59, at 516.

[359] See, L. Caldwell, Science and the National Environmental Policy Act (1982). This is true even though the Supreme Court has held that the courts may not substantively review agency actions for failure to comply with NEPA's substantive mandates. See, Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

[360] Fiorino Interview, supra note 319 (speaking of EPA during the Gorsuch years); Cristofaro Interview, supra note 314; Updegraff Interview, supra note 76.

with analytical thinking or may have adopted a techno-bureaucratic approach to decisionmaking much like that of the technical staff in the program office. Indeed, upper level decisionmakers in some agencies are typically chosen from the technical staff in the program office. On the other hand, an open-minded upper level decisionmaker may over time develop a resistance to analysis because of the weaknesses of analysis itself.

To the extent that upper level resistance to analysis is attributable to lack of familiarity with comprehensive analytical rationality, it can be remedied by structuring the decisionmaking process so that it gives the agency analysts more effective input, a possibility that will be explored in Chapter 5. If, however, upper level decisionmakers do not desire analytical input even after being advised as to its virtues, the only remedy for the proponent of comprehensive analytical rationality lies in review mechanisms.

While upper level resistance to analysis may in some cases be explained by ignorance or narrow-mindedness, it more likely reflects concern for political viability of agency decisions, a concern that is not always compatible with comprehensive analytical rationality. Regulatory analysts in the agencies frequently complain that "political" considerations often overwhelm their attempts at rational analysis.[361] While regulatory analysis has much to do with "policy," it is in many ways antithetical to "politics."[362] Analysis has little to do with the pulls and tugs of the interests that are intensely affected by an agency's rulemaking initiatives. Regulatory analysis can do little to facilitate the inevitable compromises among competing interest groups that are fundamental to the successful implementation of any regulatory strategy. As a result, agency analysts believe that "political" considerations cause upper level decisionmakers to resist their analytical efforts.

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[361] See, Vogt Interview, supra note 84; Beliles Interview, supra note 161; Cristofaro Interview, supra note 314. See generally, Lindblom, supra note 3, at 5 ("At one time or another almost everyone complains about 'politics' in policymaking."); Peak Interview, supra note 20.

[362] Edwards & Sharkansky point out:

> Policymakers are not free to move directly from estimating the consequences of policy alternatives to selecting the policies with the most favorable consequences. They are constrained in their decisions by forces in their environment. Some forces prevent options from being chosen while others help determine which policies have priority.

Edwards & Sharkansky, supra note 3, at 213.

The analysts are correct in concluding that politics impedes the effectiveness of analysis. Long time students of the regulatory process are almost unanimous in their conclusion that politics plays a prominent role in administrative policymaking.[363] Many would argue that this is entirely appropriate in a representative democracy.[364] Given the previously explored capacity of regulatory analysis to mask policy preferences behind the facade of objective rationality, some observers believe that too heavy reliance on regulatory analysis could reduce the public accountability of the agencies.[365] Politics and regulatory analysis will probably always be at odds with one another in much the same way that comprehensive analytical rationality and techno-bureaucratic rationality are cooperating conceptions of rulemaking rationality. To some extent the fact that regulatory analysis plays any role at all in controversial rulemaking actions should be counted as a victory for comprehensive analytical rationality.[366] The best decisionmaking may well reflect the interplay of all three kinds of thinking.[367]

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363 See, Banfield, supra note 59, at 3; Silberman, supra note 4, at 40; Meltsner, supra note 3, at 276; Lindblom, supra note 3, at 4; Edwards & Sharkansky, supra note 3, at 12.

364 See, Banfield, supra note 59, at 3; 1981 H.R. 746 Hearings, supra note 11, at 840 (testimony of AFL-CIO).

365 See, Banfield, supra note 59, at 3.

366 Lindblom, supra note 3, at 6.

367 See generally, Cramton and Berg, supra note 59, at 533. ("It is inevitable in our political system that many significant decisions will represent compromises of one kind or another. These compromises will reflect not only a balancing of rational values, but frequently the vectors of contending forces.")

3. Statutory Constraints on the Use of Analysis.

The agencies' own statutes can erect impediments to analysis of two principal varieties. First, a statute can directly or by implication prohibit the use of one or more elements of regulatory analysis in the agency decisionmaking process. Second, an agency statute can so narrowly confine an agency's regulatory discretion that comprehensive analysis is essentially useless.

a. Limitations on the Use of Analysis.

In Chapter 3 we observed that in several regulatory programs agency statutes precluded the agencies from considering either cost analysis or cost-benefit analysis.[368] For example, the Supreme Court has held that OSHA may not base its health standards on cost/benefit analysis,[369] and the D.C. Circuit has held that EPA may not consider costs in promulgating National Ambient Air Quality Standards.[370] Obviously, such statutory constraints create significant impediments to the use of analysis by the agency's decisionmakers.[371] Executive Order 12291, however, is quite explicit in its command that the agencies use regulatory analysis in the decisionmaking process.

Both agencies have resolved the contradictory commands by calculating the costs and benefits of regulations in compliance with the Executive Order, but refusing to use the analysis in the decisionmaking process. In EPA, for example, regulatory analysts in the Office of Air and Radiation painstakingly calculate the costs and benefits of National Ambient Air Quality Standards, but they do not send those analyses through the scientific peer review process, and the Administrator refuses to read them. The artificiality of this attempt to shield the decisionmaking process from analysis has been discussed in Chapter 3.

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[368] See, GAO Cost-Benefit Report, supra note 29, at 15.

[369] See, Chapter 3, at Notes 745-748.

[370] Lead Industries Association v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980) and American Petroleum Institute v. Costle, 609 F.2d 20 (D.C. Cir. 1979).

[371] See, Hall Hearings, supra note 22, at 597 (testimony of Mr. Joseph Cannon, former Associate Administrator for OPRM); Luken Interview, supra note 84; Nichols Interview, supra note 84; Basala Interview, supra note 189.

Even if an agency's statute precludes agency decisionmakers from using elements of regulatory analysis in forming their decisions, the exercise of preparing a regulatory analysis can be useful to the agency and the outside world. First, the exercise can be helpful to the agency in setting long range priorities and evaluating rules after they have been in effect for a time.[372] Similarly, regulatory analyses can be useful in designing alternative regulatory strategies and in educating agency employees generally about the costs of regulations and the existence of alternative decisionmaking criteria.[373]

Second, to the extent that Congress and the public become aware of the analysis, they can use it in overseeing and evaluating the statutes that preclude the analysis. In this sense, regulatory analysis can "rub everyone's nose in the senselessness of the statute."[374] If Congress concludes that the statute is senseless, then Congress can amend it.[375] Finally, even if the agency cannot consider analysis, a regulatory analysis document that reveals that the benefits of the agency's action outweigh its costs can make the decision more acceptable to the public.[376]

Agencies should therefore be encouraged to prepare regulatory analysis describing advantages and disadvantages of regulatory alternatives, even though the analysis may not be immediately useful to agency decisionmakers.[377] The General

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[372] See, Survey of Ten Agencies, supra note 17, at 21.

[373] See, Chapter 3, at Notes 1330-1338.

[374] See, Campbell Interview, supra note 84.

[375] In addition, states and other regulatory decisionmakers can use the regulatory analysis in framing their own regulatory requirements. GAO Cost-Benefit Report, supra note 29, at 18.

[376] See, GAO Cost-Benefit Report, supra note 29, at 18; Conflict of Interest Hearings, supra note 8, at 688
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[377] Forty Questions, supra note 200, at 20827 [citing 40 CFR § 1506.2(d) and 40 CFR § 1501.1(a)].

Accounting Office has recommended that analyses that cannot be considered by agency decisionmakers should nevertheless be prepared and sent to Congress for use in evaluating statutes that preclude the use of certain kinds of analysis.[378] Because there may be valid reasons for the statutory provisions that preclude the use of analytical devices such as cost-benefit analysis, Congress may be persuaded. But it should still be informed to the extent the regulatory analysis documents are capable of informing.

On the other hand, regulatory analysis documents for major rules come at no small expense of agency resources, and agencies must realistically weigh the value of an analysis that cannot be used against its costs. Unless the agencies and OMB are prepared to request resources for regulatory analysis and Congress is willing to provide them, agencies are probably justified in refusing to prepare regulatory analysis documents for rules that preclude their consideration to the same extent that they are prepared for other rules. Perhaps a suitable compromise is to prepare full-fledged Regulatory Impact Analyses for "major" rules or to prepare only useful sections of regulatory analysis documents for lesser rules that do not require an RIA under Executive Order 12291.

b. Alternatives Beyond the Agency's Statutory Authority.

A good regulatory analysis will not necessarily stop at the agency's statutory boundaries. Brainstorming sessions among regulatory analysts and technical staff will often produce alternatives that the agency lacks authority to implement. The inability of the agency to implement one of the alternatives identified during the regulatory analysis process is an impediment to the use of analysis in the decisionmaking process.[379] Since the agency cannot lawfully choose one of

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376 (testimony of Ms. Barbara Blum, former Deputy Administrator, EPA).

378 GAO Cost-Benefit Report, supra note 29, at v. See also, H. Rep. 97-435, supra note 103, at 45 (recommending that

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379 Verkuil, supra note 27, at 247-48. See, Fiorino Interview, supra note 319; Peak Interview, supra note 20;

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these alternatives, it arguably should not consume scarce resources analyzing them.[380] Indeed, examining alternatives beyond the agency's statute can have perverse effects on the agency's rationales for its decisions. For example an agency could probe several "straw man" alternatives that it had no authority to implement and end the analysis with the only alternative that it did have authority to adopt.[381]

Yet considering alternatives outside the agency's statute can advance the regulatory analysis goal of informing Congress and the public of the effects of regulation.[382] If the

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378 regulatory analyses be prepared to inform the public, even when the agency may not consider costs).

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379 Telephone Interview with Mr. Neil Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, May 6, 1983 [hereinafter cited as Eisner Interview]; Telephone Interview with Mr. Gene Rosera, Commodity Analysis Division, and Conservation Service, USDA, May 1, 1984 [hereinafter cited as Rosera Interview].

[380] See, 1981 H.R. 746 Hearings, supra note 11, at 891 (testimony of Federal Trade Commission). H. Rep. 97-435, supra note 103, at 432. ("Agencies should only consider alternatives that are consistent with the enabling statute under which they are acting.") For this reason FAA regulatory analysis documents do not examine alternatives beyond the agency's statutory authority. See, Chapter 3 at Notes 390-394. The DOT Handbook for regulatory analysis, however, encourages agencies within that Department to consider alternatives beyond their statutory authority. See, Chapter 3 at Notes 466-470.

[381] See, 1981 H.R. 746 Hearings, supra note 11, at 349 (testimony of American Gas Association).

[382] One could argue, on the other hand, that in limiting the agency's discretion in its statute, Congress has already weighed the costs and benefits of alternative approaches. See, 1981 Regulatory Reform Hearings, supra note 20, at 668-69 (testimony of Interstate Commerce Commission). This argument, however, misses the point that regulatory

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regulatory analysis reveals that the agency could not adopt a more cost-effective alternative because it lacked statutory authority, Congress might be persuaded to grant the agency more authority or more flexibility in implementing its existing authority.[383] Largely for this reason, OMB's Guidance on regulatory impact analysis and some agency regulatory analysis guidelines require regulatory analysis to include alternatives beyond the authority of the agency.[384] Agencies must already consider alternatives beyond their authority to comply with the environmental impact statement requirement of the National Environmental Policy Act.[385] Although considering unimplementable alternatives will entail more expense to the agencies, the added public informational value probably outweighs the cost. However, as with the EIS requirement, agencies should follow a "rule of reason" in selecting the alternatives worthy of detailed study.[386] They should not waste scarce analytical resources studying approaches that are so far-fetched that they stand no reasonable practical chance of implementation in the near future.

4. Use of Analysis to Advance Substantive Goals. As we have seen, one of the important themes of recent regulatory reform initiatives is the substantive goal of

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[382] analysis is intended to inform decisionmakers. With the new information in a regulatory analysis document, Congress might view the costs and benefits differently.

[383] See, S. Rep. 97-305, supra note 12, at 49-50. Cf. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (agencies must analyze reasonable alternatives beyond the agency's authority).

[384] See, Office of Management and Budget, Interim Regulatory Impact Analysis Guidance (June 12, 1981), at § 2(b), 2(d), see, Chapter 3, at Notes 466-470 (DOT), Notes 719-721 (OSHA), Notes 1268-1275 (EPA).

[385] 40 C.F.R. § 1502.14 (1984). See, Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

[386] J. Bonine and T. McGarity, The Law of Environmental Protection 147 (1984).

"regulatory relief." Many regulatory reformers believe that bringing comprehensive analytical rationality to bear on regulatory problems will ultimately result in relief to regulated entities. They further hold that the extent to which regulatory analysis secures regulatory relief is the primary measure of its effectiveness.[387] There are, however, several objections to this use (some would say "abuse") of regulatory analysis.

One very serious objection to using regulatory analysis to bring about regulatory relief is that it can run counter to declared Congressional policy. Regulatory agencies are not free to amend their statutes, however silly their policy goals appear to those who occupy decisionmaking roles in those agencies. While decisionmakers in regulatory agencies typically have broad discretion to apply a wide variety of policies to regulatory problems, there are limits to this discretion. If regulatory analysis indicates that the preferred option is one that would provide relief to the regulated industry and if that option runs counter to the agency's statute, the agency is not free to adopt it. Agencies should therefore not attempt to use regulatory analysis as a device for providing regulatory relief that Congress has not authorized.[388]

Perhaps an even more important objection to using regulatory analysis to further particular substantive goals is the threat that this use of analysis poses to the integrity of analysis itself. As we have seen, analysis is a tool for measuring regulatory options against predetermined policy goals; it is not capable of serving as a meta-instrument for defining those goals. It may well be that thorough analysis will indirectly further regulatory relief goals, but good analysis need not necessarily yield regulatory relief. In many cases a thorough analysis of the costs and benefits of a proposed regulation may, as in the case of EPA's lead phasedown regulations, indicate that the regulatory response should be even more stringent. To rely upon regulatory analysis when it points toward one substantive end but to deny it when it points to another smacks of hypocrisy.[389]

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[387] See, Eads, Harnessing Regulation: The Evolving Role of White House Oversight, Reg. 18 (May/June 1981); Sunstein, supra note 117, at 1280.

[388] See, 1982 GAO Report, supra note 3, at 8; 1981 H.R. 746 Hearings, supra note 11, at 8 (testimony of Senator Thomas Eagleton) (cautioning against using "neutral-seeming procedural changes as vehicles for making far-reaching modifications in particular substantive statutes."); 1981 H.R. 746 Hearings, supra note 11, at 276 (testimony of Federal Communications Commission); 1981 Regulatory Reform Hearings, supra note 20, at 251 (testimony of Mr. Lester Lave, Brookings Institution).

Using regulatory analysis with the avowed intent of securing relief for regulated industries can only serve to discredit the analytical enterprise.[390] We have seen how analysis can easily be manipulated by analysts or upper level decisionmakers to produce post hoc rationalizations for decisions previously reached on other grounds. If analysis is broadly perceived by the beneficiaries of regulation as a tool for furthering regulatory relief goals, then they will object to the tool as well as to the goals. More importantly, they will place little trust in the products of regulatory analysis and condemn all decisions based upon regulatory analysis as politically motivated, thereby depriving analysis of its primary virtue--its perceived objectivity.[391]

Many members of the technical staffs in the program offices of the agencies studied in connection with this report strongly believe that regulatory analysis is currently being used as a tool for furthering particular substantive ends. This impression is almost universally shared by representatives for beneficiaries of regulation.[392] Even many regulatory

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[389] Inside OMB, Feb. 1, 1982, at 1.

[390] Litan & Nordhaus, supra note 94, at 132.

[391] See, Hall Hearings, supra note 22, at 476 (testimony of Congressman Richard Ottinger); id., at 351 (testimony of Ms. Eula Bingham, former Assistant Secretary for Occupational Safety and Health, DOL); id., at 429 (testimony of Mr. Edward Durkin, Food and Beverage Trades Dept., AFL-CIO); Personal Interview with Ms. Francis Dubrowski, Natural Resources Defense Council, December 2, 1983.

[392] See, e.g. Hall Hearings, supra note 22, at 116-118 (testimony of Ms. Joan Claybrook, Public Citizen); id., at 220 (testimony of Mr. Clarence Ditlow, Director,

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analysts in the agencies agree that the regulatory analysis process is on many occasions being used to wage war against regulation, rather than as a tool to produce better regulation.

Many observers of the regulatory analysis process are convinced that it is being used solely to impede or delay the issuance of protective rules.[393] They point to numerous instances in which the rulemaking process has been delayed while the agencies prepare and the Office of Management and Budget reviews regulatory analysis documents.[394] The review process for some important rules has consumed several months or even years.[395] Thus, while it may be claimed that regulatory analysis has stemmed the flow of rules,[396] in many cases it has done so by brute force, rather than through the persuasiveness of its reasoning.[397]

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392 Center for Auto Safety); id., at 558-59 (testimony of Mr. William S. Jordon III, Union for Concerned Scientists).

393 See, Swartzman, supra note 119, at 68-69; 1981 H.R. 746 Hearings, supra note 11, at 8 (testimony of Senator Thomas Eagleton); Hall Hearings, supra note 22, at 430 (testimony of Food and Beverage Trades Department, AFL-CIO); Costle, supra note 132, at 418.

394 The OMB review process has recently been challenged in a lawsuit involving OSHA's occupational health standard for ethylene oxide. New York Times, April 10, 1985, at p. 12, col. 1.

395 See, e.g., Hall Hearings, Supplement, supra note 22, at 1183, 1595-97, 1615-18; Chapter 3, at Notes 1176-1182; Dubrowski Interview, supra note 388.

396 OMB has been successful in convincing many agencies to withdraw or substantially modify many major rules. See, OMB, Executive Order 12291 on Federal Regulations Progress During 1981 (1982); Hall Hearings, supra note 22, at 1462-68 (USDA); Personal Interview with Mr. Thomas Leonard, Office of Information and Regulatory Affairs,

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397 See, Hall Hearings, supra note 22, at 533 (testimony of Mr. Jerry Hill, former Assistant Secretary of

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Critics have also challenged OMB's practice, sanctioned in Executive Order 12291,[398] of granting waivers from the regulatory analysis requirement to rules designed to provide regulatory relief.[399] Proponents of this practice claim that no analysis is needed for a rule that demonstrably reduces the

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396 OMB, May 19, 1982; 1982 GAO Report, supra note 3, at 4; Hall Hearings, supra note 22, at 1562 (EPA); Dubrowski Interview, supra note 388.

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397 Agriculture) (explaining how delays in OMB review of cherry marketing orders effectively prevented the promulgation of the rule); Leonard Interview, supra note 393 (same); J. Lash, A Season of Spoils 72 (1984) (Congressman Albert Gore's reference to "the regulatory black hole at OMB"); Hall Hearings, supra note 22, at 52 (testimony of Ms. Joan Bernstein, former General Counsel, EPA); H. Rept. No. 97-435, supra note 103, at 51-52; 1981 Regulatory Reform Hearings, supra note 20, at 263 (testimony of Institute for Public Interest Representation).

398 Exec. Order No. 12,291 supra note 82, at § 8(b). One of the regulatory reform bills of the early 1980s would have exempted deregulatory actions from their regulatory analysis requirements. See, H.R. 746 97th Cong., 1st Sess. § 621(2)(c) (1981) (exempting rules, other than rules with substantial impact on health, safety, or the environment, that repeal, withdraw, or otherwise modify rules so as to eliminate or reduce the compliance burdens of those rules). The other major regulatory reform bill would not have exempted major deregulatory initiatives, except for rules authorizing the introduction into commerce of a product or service.. See, S. Rep. 97-305, supra note 12, at 44 (Senate Governmental Affairs version of S. 1080); S. Rep. 97-284, supra note 6, at 138 (Senate Judiciary Committee version of S. 1080). The rational for exempting these rules, however, was that they were the functional equivalent of adjudications, and the regulatory analysis requirements were not intended to apply to adjudications. See, S. Rep. 97-305, supra note 12.

399 The Regulatory Flexibility Act apparently does not exempt

burden of government regulation.[400] They point out that many existing rules were promulgated without the benefit of analysis, and argue that it would be unfair to require an analysis prior to reducing the burdens of those rules.[401] They also argue that regulatory analysis requirements could delay major deregulatory initiatives.[402] In addition, they caution that the benefits of deregulatory actions may be more difficult to quantify than the costs, thereby biasing the analysis against deregulation.[403]

Critics of the practice of exempting regulatory relief activities argue that it is duplicitous to complain of delays involved in preparing regulatory analysis documents for deregulatory actions and not be concerned about similar delays for regulatory actions.[404] Likewise, quantifying benefits is a difficulty that plagues regulation as well as deregulation; if that rationale suggests that regulatory analysis is inappropriate for deregulatory action, it suggests the same for health, safety and environmental regulations. Critics point out that deregulatory initiatives can have hidden detrimental effects on some segments of regulated industries that should be

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399 deregulatory rules. See, Verkuil, supra note 27, at 243.

[400] See, 1981 H.R. 746 Hearings, supra note 11, at 177 (testimony of American Bar Association); 1981 Regulatory Reform Hearings, supra note 20 (testimony of Mr. Boyden Gray, Counselor to the Vice President); 1981 Regulatory Reform Hearings, supra note 20, at 630 (testimony of Federal Home Loan Bank Board).

[401] See, H. Rept. 97-435, supra note 103, at 37.

[402] See, 1981 H.R. 746 Hearings, supra note 11, at 875 (testimony of Federal Communications Commission); 1981 H.R. 746 Hearings, supra note 11, at 667 (testimony of Mr. James Miller, Administrator for Information and Regulatory Affairs, OMB); 1981 H.R. 746 Hearings, supra note 11, at 837 (testimony of National Food Processors Association).

[403] 1981 H.R. 746 Hearings, supra note 11, at 592 (testimony of Federal Communications Commission).

[404] See, 1981 H.R. 746 Hearings, supra note 11, at 690 (testimony of National Legal Aid Defenders Association).

examined in a rational analysis before they are put into place.[405] Perhaps more importantly, deregulatory initiatives can have unforeseen detrimental effects on human health and environmental quality.[406]

If the regulatory analysis requirement is sensible for regulatory activities, it is likewise sensible for activities that may reduce the burdens of regulation on some segments of the economy. It should therefore be applied even-handedly.[407] To make regulatory analysis a one-way street is to suggest that it has no instrumental virtue, but is useful only as another tactic in the never ending battles over the substance of rules. If for no other reason than its considerable expense to the taxpayer, this is a poor use of regulatory analysis. If regulatory analysis is worthless as an analytical tool for shaping better regulations, it should be abandoned and not cynically employed as a barrier to further regulation. In sum, despite the frequent identification of regulatory analysis with the regulatory relief prong of the regulatory reform movement, regulatory relief is an inappropriate use for regulatory analysis.

V. Conclusion.

The foregoing discussion has suggested that regulatory analysis is a very imprecise tool. Yet despite its considerable shortcomings, it has important virtues. It can be very useful to decisionmakers and the public in sorting out the pros and cons of regulatory options. Every decisionmaker would like to make rational and informed decisions. While regulatory analysis cannot fully inform and cannot precisely point to rational conclusions, it can help. Perhaps more importantly, it can encourage the decisionmaker to articulate policy preferences and demonstrate to the public how those policy preferences were applied in important rulemaking initiatives. If the public (and particularly the beneficiaries of regulation) can become convinced that it is not being used cynically to reach particular substantive results, regulatory analysis can become an effective mechanism for enhancing public accountability.

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[405] See, H. Rep. 97-435, supra note 103, at 37; 1981 Regulatory Reform Hearings, supra note 20, at 254 (testimony of Mr. Lester Lave, economist, Brookings Institution); 1981 Regulatory Reform Hearings, supra note 20, at 206-07 (testimony of General Accounting Office).

[406] See, S. Rep. 97-305, supra note 12, at 44.

[407] See, 1981 Regulatory Reform Hearings, supra note 20, at 254 (testimony of Mr. Lester Lave, economist, Brookings Institution).

We have also seen in this Chapter that regulatory analysis can be improved. Many of the impediments to analysis can be removed without doing much damage to the process. We will see in Chapter 5 that even more improvement is possible through rearranging the way in which regulatory analysis is structured into the decisionmaking process. Whether the remaining virtues justify the cost to society of preparing the analysis documents is ultimately a question about which reasonable minds can differ.

CHAPTER FIVE
STRUCTURING REGULATORY ANALYSIS INTO THE DECISIONMAKING PROCESS

I. Introduction.

As we observed in Chapter 1, Executive Order 12291 and its predecessors represent an ambitious attempt to bring comprehensive analytical rationality to bear upon regulatory decisionmaking. Institutional decisionmaking is, of course, very different from individual decisionmaking in that there is no single brain to engage in institutional thinking. Most regulatory decisions reflect the outcomes of numerous encounters between the various institutional entities that have a role to play in the decisionmaking process and represent a "synthesis" of their views.

The requirement of Executive Order 12291 that agencies prepare regulatory analysis documents does not by itself ensure that the contents of those documents will affect the substantive content of agency decisions. Bulky analytical documents can be ignored by subordinate decisionmaking units, and upper level decisionmakers in most busy agencies simply do not have time to absorb the contents of lengthy regulatory analysis documents. The goal of the executive order is not to ensure that agencies prepare documents; it is to bring comprehensive analytical rationality to bear upon a decisionmaking process that has traditionally been dominated by techno-bureaucratic rationality. The discussion of the real-world decisionmaking process in Chapter 3 suggests that the regulatory analysis documents themselves have only affected agency decisionmaking to a modest degree.[1]

If the regulatory analysis requirements of the recent executive orders cannot ensure that upper level decisionmakers are influenced by comprehensive analytical rationality through their familiarity with regulatory analysis documents, they can influence agency decisionmaking in a more subtle fashion. Once the agency establishes a "regulatory analysis office" with an institutional stake in comprehensive analytical thinking, agency decisionmakers can adjust the extent to which that kind of thinking affects agency decisions by structuring the decisionmaking process to give that office a greater or lesser role. Hence, to discover the real role that analysis plays in an agency, one must focus attention on the role of the regulatory analyst, rather than on the document that the analyst prepares. The role of the analyst will, to a very large degree, determine the extent to which analysis affects regulatory agency decisionmaking.

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[1] See, Chapter 3 at Notes 719-722 (OSHA); Chapter 3 at Notes 1305-1338 (EPA); Chapter 3 at Notes 220-225 (FSIS); Chapter 3 at Notes 227-228 (AMS); Chapter 3 at Notes 516-546 (DOT). But see, Chapter 3 at Notes 529-531 (FAA); Chapter 3 at Notes 516-617 (NHTSA); Chapter 3 at Notes 232-237 (ASCS).

Chapter 5 will describe several roles that regulatory analysts can play in the regulatory decisionmaking process and analyze some of the advantages and disadvantages of each of those roles. It will then explore several possible institutional ways to structure the internal agency decisionmaking process to include the regulatory analysis office. Finally, it will suggest conditions under which each of the institutional structures may or may not be appropriate.

II. Roles for the Regulatory Analyst.

The nature of the regulatory analyst's function in a regulatory bureaucracy depends upon the level of trust that upper level decisionmakers place in their analytical product. In some agencies, regulatory analysts have been no more than glorified "gofers," tracking down relevant information for other agency employees to use in the decisionmaking process. In other agencies, the regulatory analysts have, to a very large extent, determined agency policy in individual rulemaking efforts. Still other agencies have yet to establish a separate regulatory analysis office.

As we have seen in Chapter 3, some agencies would have afforded regulatory analysts a prominent role in the decisionmaking process, even in the absence of a regulatory analysis requirement. In other agencies, however, the requirement of recent executive orders that agencies prepare regulatory analysis documents to accompany major rulemaking efforts has forced most nonindependent regulatory agencies to employ a separate staff of regulatory analysts. In some agencies that staff occupies an isolated niche in the organizational chart and speaks only when spoken to. In many agencies, however, the organizational units that arose out of the institutional need to prepare regulatory analysis documents have begun to assume a larger role in the decisionmaking process.[2]

The description of the regulatory analysis process in Chapter 3 also suggests that regulatory analysts need not be neutral adjuncts to the decisionmaking process. Although it is probably premature to characterize policy analysis as a full-fledged profession,[3] many regulatory analysts have received similar training and they share many common values. Yet, in the past, the agencies have not assigned these experts a well-defined role in the decisionmaking process.[4] While regulatory analysts must constantly attempt to preserve the appearance of neutrality and objectivity, they can be important political actors within the confines of the bureaucracy, and occasionally their political importance extends beyond the agency's confines.[5] As we have seen in Chapter 4, many of the ostensibly technical questions that arise in agency rulemaking activities can only be answered by applying a heavy dose of policy to sparse data. Determining the content of that policy is a value laden enterprise, and the result of the analysis must inevitably reflect somebody's values. To the extent that a regulatory analysis reflects the analyst's values and to the extent that the analysis guides the decisionmaker, then the analyst can become an influential determinant of agency policy.

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[2] Telephone Interview with Mr. Gail Updegraff, formerly Deputy Director Policy and Program Planning Staff, Food Safety and Inspection Service, USDA, March 13, 1984; Telephone Interview with Ms. Judith Segal, Director Policy and Program Planning Staff, Food Safety and Inspection Service, USDA, March 15, 1984 [hereinafter cited as Segal Interview]; Telephone Interview with Ms. Rita Anselmo, Policy Analyst, Policy Analysis and Program Evaluation Staff, Animal and Plant Health Inspection Service, USDA, May 5, 1983. See also Viscusi, Presidential Oversight: Controlling the Regulators, 2 J. Policy Analysis & Mgmt. 157, 164 (1983) [hereinafter cited as Viscusi]; Council on Wage and Price Stability and the Office of Management and Budget, An Evaluation of the Inflation Impact Statement Program Prepared for the Economic Policy Board 59 (December 7, 1976) (Thomas Hopkins, principal author) [hereinafter cited as 1976 IIS Report]. (The Inflation Impact Statement program "has provided a 'bureaucratic' case for more and better economic analysis, buttressing requests for resources and leading to a greater role for economic analysis in the regulatory process.")

[3] See, A. Meltsner, Policy Analysts in the Bureaucracy 11 (1976). (Policy analysts are "members of an emerging profession without enforceable standards and sanctions."); Benveniste, On a Code of Ethics for Policy Experts, 3 J. Policy Analysis and Management 561 (1984) [hereinafter cited as Benveniste Ethics].

[4] See, Jenkins - Smith, Professional Roles for Policy Analysts: A Critical Assessment, 2 J. Policy Analysis & Mgmt. 88 (1982).

Some past efforts to explore the role of policy analysts in bureaucracies have followed Professor Downs' lead in focusing upon personality characteristics of the bureaucrats that they studied.[6] For example, on the basis of interviews exploring the self-perception of policy analysts in government bureaucracies, Professor Meltsner has divided policy analysts into four broad categories according to perceived political skills and analytical talents: (1) entrepreneurs have high political skills and high analytical skills; (2) politicians have high political skills and low analytical skills; (3) technicians have low political skills and high analytical skills; and (4) pretenders have low political skills and low analytical skills.[7] Jenkins-Smith similarly divides policy analysts into three categories: (1) the objective technician searches for programs that maximize the net benefit to society; (2) the issue advocate is a political actor who attempts to advance particular views of appropriate public policy; and the (3) client advocate views his or her role as that of advancing the viewpoint of his or her client within the bureaucracy.[8]

While these attempts to group policy analysts are useful in characterizing the role of policy analysts in bureaucracies, the more important question for our purposes is the institutional role that the unit containing policy analysts plays in a given bureaucracy. Once a regulatory analysis office is created, whether or not it is inhabited largely by entrepreneurs, politicians, technicians, or pretenders may depend upon happenstance, but it will more likely reflect conscious institutional choices. Entrepreneurs will not stay long in an office that has been assigned a backwater institutional role, and pretenders will not last long in an office that has been assigned an important substantive role in the institutional decisionmaking process.

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[5] See generally, G. Benveniste, The Politics of Expertise 29, 75 (1977); A. Meltsner, supra note 3 at 10-13 [hereinafter cited as Benveniste].

[6] See, A. Downs, Inside Bureaucracy (1966).

[7] Meltsner, supra note 3, at 16.

[8] Jenkins-Smith, supra note 4, 15 92-95.

On the other hand, personality characteristics can be very influential in determining the institutional role that the regulatory analysis office plays at any given time. For example, if the head of the regulatory analysis office is a successful entrepreneur or politician, that office may assume a prominent decisionmaking role during his or her tenure. In the real world, personalities and skills may often be more relevant to the assignment of institutional roles than more abstract considerations of professional outlook and style. Yet over the long haul, the upper level decisionmakers who are responsible for structuring the institution ought to be at least as interested in the essential characteristics of the profession when assigning members of that profession to particular institutional roles as they are about the personal characteristics of particular agency employees.

This chapter therefore starts from the premise that upper level decisionmakers in a particular agency should make a conscious decision about the role that they want regulatory analysts to play in agency decisionmaking. That decision should reflect an assessment of the general strengths and weaknesses of the budding profession of policy analysis as well as the talents of the regulatory analysts that are presently on the staff. It should also depend upon the extent to which upper level decisionmakers want substantive agency decisions to reflect the particular policy perspectives of regulatory analysts. The chapter finally suggests that upper level decisionmakers should structure the decisionmaking process so as to allow the agency analysts most effectively to play their consciously assigned role.

A. Information Analyst.

Perhaps the most familiar role of the regulatory analysts is that of provider and analyzer of information on the costs and benefits of particular regulatory options.[9] Virtually all of the regulatory analysts interviewed in connection with this Report viewed this as at least one of their roles,[10] and several viewed it as their only role in the decisionmaking process.[11] In this sense the analyst does not "create" knowledge.[12] He or she simply gathers existing information, culls the useful information from the useless, organizes information to fit the agency's needs, and communicates that information to the decisionmaker and the public in an understandable fashion.[13]

Without doubt, regulatory decisionmakers need an institutional entity that is capable of seeking out and culling information about the extraordinarily complex issues that arise in complicated rulemaking proceedings. Without digestible information on how much a regulatory initiative will cost and some notion of societal benefits, the decisionmaker cannot begin to make rational choices among regulatory options. Regulatory analysts with professional training in gathering, analyzing, quantifying, and displaying technical information may serve the information-providing function better than members of the technical staff in the program offices, who usually lack such training. While the question of the amount of resources that should be devoted to information-gathering activities is always subject to legitimate debate, most observers of the rulemaking process would no doubt agree that agencies should devote some resources to this activity.

It is less obvious that the information-providing function should be carried out in a separate institutional office. The technical staff in the program offices are no doubt capable of serving the decisionmakers' basic informational needs, even though they lack special training in analyzing and displaying information. Still, regulatory analysts by training have a quantitative perspective that should enable them to make choices clearer to upper level decisionmakers. In addition, regulatory analysts in the agencies share a relatively strong perception that the technical staff in the program offices do not study carefully enough the costs of the restrictions that they propose to impose on regulated industries. Yet, as we have seen in Chapter 4, the unique perspective of many regulatory analysts, focusing as it does on the economist's paradigm, can also distort the information-gathering and display function.

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[9] See, Meltsner, supra note 3, at 261, 293; Benveniste, supra note 5, at 90.

[10] See Chapter 3 at Notes 325-333 (NHTSA); Chapter 3 at Notes 220-226 (FSIS)

[11] See, Chapter 3 at Notes 395-396 (FAA); Chapter 3 at Notes 916-919 (EPA - Office of Air Quality Planning and Standards); Chapter 3 at Notes 229-231 (APHIS).

[12] A. Meltsner, supra note 2, at 55.

[13] See Meltsner, supra note 3, at 55. (The policy analyst "is like a manufacturer assembling a product out of somebody else's resources. In his assembling he adds an element of quality control by screening information.")

B. Justifier.

Through various findings and reasons requirements in the Administrative Procedure Act and other statutes, our society demands that regulatory agencies provide rational justifications for many of their decisions. Courts enforce these requirements during judicial review, and OMB may demand even greater justification in the executive review process established under Executive Order 12291.[14] Yet, as we have seen in Chapter 4, many important issues that arise in regulatory decisionmaking cannot be resolved on the basis of existing information, and policy considerations must therefore play a very large role in determining the outcome. Persons familiar with the real world decisionmaking processes in regulatory agencies know that considerations that are irrelevant to a rational analysis of a regulatory problem, such as the predicted reaction to the decision of the public or an important congressional committee, often dictate the choice among the available options.[15] The external requirements for findings and reasons nevertheless create a strong institutional demand for justification on other grounds. Most of the technical staff in the program office and some upper level decisionmakers would generally prefer that the regulatory analysis staff play the justifier role.[16]

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[14] Interestingly, society rarely demands similar formal justifications for important decisions of private entities, except in rare instances such as when a plaintiff can establish by statistical evidence that an employer has hired disproportionately few persons from a racial minority. See, McGarity & Schroeder, Risk-Oriented Employment Screening, 59 Tex. L. Rev. 999 (1981).

[15] Wall St. J., Oct. 9, 1981, at 4, col. 2.

Most regulatory analysts, however, draw a sharp distinction between the role of information-provider and the role of justifier. It is one thing, in this view, to provide information relevant to a decision that has yet to be made, and another thing to craft an analysis information to justify a decision that has already been made. While some regulatory analysts are apparently willing to assume the role of post hoc justifier,[17] most desire to play a more influential role in the agency decisionmaking process. They believe that allowing themselves to be used as pawns in larger power plays would greatly damage the credibility of the newly emerging profession.[18] In this view, if the analysts must go to the

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[16] See, e.g., Foster, An Advocate Role Model for Policy Analysis, 8 Policy Studies J. 958 (1980); Behn, Policy Analysis and Policy Politics, 7 Policy Analysis 199, 216 (1981); Horowitz, Social Science Mandarins: Policymaking as a Political Formula, 1 Policy Sciences 339, 340 (1970). ("Social scientists engaged in governmental work are committed to an advocacy model definned by politicians. For the most part, they do not establish or even verify policy -- only legitimize policy). Meltsner, supra note 3; Benveniste, supra note 5, at 55 (speaking of "the use of experts to reassure everyone that decisions taken for other motives appear to have been taken for rational, technical reasons.").

[17] Policy analysts who fit Jenkins-Smith's description of "client advocate" are apparently willing to accept the justifier role. See Jenkins-Smith, supra note 4, at 95. Jenkins-Smith observes that many students of policy analysis believe that "client advocates" are the most predominant variety of policy analysts in the bureaucracies. Jenkins-Smith, supra note 4, at 95. Professor Foster suggests that policy analysts should be more candid and acknowledge their justifier role in which

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[18] See Chapter 3 at Notes 471-476 (APHIS); Foster, supra note 16. Foster maintains, however, that this objection

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trouble of gathering and analyzing the information, it ought at least to be available to the decisionmaker before the decision is made. Otherwise, it is a waste of time.

A policymaker who is attuned to the inherent limitations of and practical impediments to regulatory analysis might well reply that the analysis is useful if it can help a decision survive executive, congressional, judicial, and public scrutiny, even if the decisionmaker did not actually rely upon the information set out in the regulatory analysis document. The upper level decisionmaker, in other words, might view regulatory analysis as worth the cost, regardless of its usefulness in the decisionmaking process, and he or she might view a more influential role for the regulatory analysis as an intrusion upon the policymaker's prerogatives. As long as society is unwilling to accept erstwhile "political" considerations as an acceptable rationale for administrative decisionmaking, it will probably have to tolerate a certain amount of post hoc rationalization. To the extent that agencies are forced into this mode by various procedural requirements and the threat of judicial and executive review, there will continue to be a demand for regulatory analysts to play the justifier role.

C. Policy Communicator.

Many regulatory analysts believe that in addition to analyzing information for upper level decisionmakers, their professional norms require them to analyze the policy implications of regulatory options.[19] In particular, these analysts believe that one proper role of the regulatory analyst is to measure regulatory options against explicitly articulated policy goals and communicate that analysis to upper level

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[17] "analysis essentially becomes a form of ammunition and legitimacy to be used in the policy process." Foster, supra note 16, at 960. See also, C. Jones, An Introduction to the Study of Public Policy 177 (1977).

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[18] is overblown, alluding to the legal profession which is composed entirely of advocates for clients. Foster, supra note 16, at 961.

[19] See, Chapter 3 at Note 502 (DOT); Chapter 3 at Note 226 (FSIS).

decisionmakers. Under this view, the regulatory analyst need not play a role in articulating or ranking policy goals, but he or she should advise the upper level decisionmaker on how regulatory choices advance or detract from the agency's articulated policy goals.

The technical staff in the program office are not likely to be adept at explicit policy analysis. As we observed in Chapter 4, agency decisionmaking processes can over time fall into operational patterns that yield decisions without relating the outcomes of those decisions to particular regulatory policies. Innovative analytical thought falls prey to stultifying adherence to precedent.

Reflecting on the extent to which particular decisions advance particular policies is in general a valuable function for several reasons. First, as we observed in Chapter 1, this function is critical to the application of comprehensive analytical rationality to regulatory decisionmaking. Second, to the extent that the analysis is communicated to reviewing institutions and the public, it enhances agency accountability, because it forces the agency to articulate policy goals and because it allows an interested public to observe the extent to which particular decisions advance those goals. Third, it provides periodic opportunities for the agency (and other reviewing institutions) to review agency policies in light of changed conditions. Fourth, explicit analysis of agency policy can help screen out extraneous factors, such as political considerations, that are not relevant to a rational decision based upon a given statutory command. Finally, to the extent that upper level decisionmakers carefully monitor the decisionmaking process, it helps ensure that lower level staff continue to adhere to the policy preferences of politically appointed decisionmakers, rather than following their own hidden agendas.

While upper level decisionmakers generally agree that a policy communication function is needed in the regulatory decisionmaking process, assigning this function to a separate regulatory analysis staff has some disadvantages. First, upper level decisionmakers often prefer that explicit analyses of agency policy not be publicized. In reality, Congress and the agencies do not always find it easy to articulate policies to guide regulatory decisionmaking. Invariably, the legitimate policy considerations relevant to a given regulatory decision conflict with one another, and they are not generally easy to rank. Upper level decisionmakers may therefore prefer that regulatory analysts not undertake an explicit policy analysis role. On the other hand, publicizing an explicit policy analysis may help ensure the accountability of upper level decisionmakers to reviewing agencies and the public.

Second, although analysis can be useful in identifying hidden agendas of technical staff, it can at the same time reflect hidden agendas of the regulatory analysis staff which, because of the normative aspects of its heavy reliance upon the economics discipline, may run counter to statutory or agency policy goals. Third, it may be unrealistic to believe that political considerations can be screened from the decisionmaking process entirely. Agencies operate in a political world, and upper level decisionmakers will not last long if they entirely ignore political considerations, however rationally they steer the agencies toward previously articulated policy goals. To the extent that political considerations affect the future vitality of the bureaucratic entity, they cannot accurately be characterized as "extraneous."

Finally, even assuming the value of explicit attention to the extent to which regulatory options further particular policy goals, it is not clear that this function must be performed by a separate professional staff. Politicians and bureaucratic decisionmakers have always relied upon this sort of analysis in the form of advice from trusted aides on their personal staffs. Assessing the policy (and political) consequences of particular regulatory options, in other words, is not necessarily a function that can be performed only by a person with an MPA degree from a prestigious school of public affairs.

D. Options-Identifier.

One important aspect of comprehensive analytical rationality is its preference for expanding the options that the decisionmaker considers before focusing in upon a particular option.[20] This suggests that regulatory analysts could perhaps play the valuable role of options-identifier in the regulatory decisionmaking process. With their training in economics, for example, regulatory analysts might be expected to suggest innovative incentive-based alternatives to "command and control" regulatory approaches that could more efficiently use scarce resources. Given the strong perception in many quarters of the regulatory process as stultifyingly inefficient,[21] it is difficult to argue that identifying innovative and efficient options is not a valuable role for the regulatory analyst to play in regulatory agencies.

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[20] See, Silberman, Policy Analysis: Boon or Curse for Politicians in Bureaucrats, Policy Analysts, Statesmen: Who Lead? 37, 40 (R. Goldwin ed. 1980).

The EPA "lead phasedown" proceeding provides a good example of the effective use of the regulatory analyst's options-identifier role. In that proceeding, one of the primary reasons that EPA had not proceeded more rapidly toward phasing tetraethyl lead out of gasoline was the large financial burden that a rapid phasedown would impose upon many small refiners of leaded gasoline. The existing standard had been stated in terms of grams of lead per gallon of gasoline produced by a regulated refinery. As more and more older automobiles were replaced with new automobiles that (under a separate set of regulations) could not burn leaded gasoline, larger refineries began to convert much of their capacity to unleaded gasoline. Smaller refineries that could not afford the conversion continued to produce about the same proportion of leaded gasoline. The large refiners therefore could add more lead to a gallon of their leaded gas and still meet the same "pooled" standard. Lowering the amount of lead per pooled gallon of gasoline would therefore put small refiners at an even greater disadvantage. Agency regulatory analysts, however, suggested an alternative that would allow large refiners to sell lead "rights" to small refiners, thereby greatly reducing the impact of the lowered standard on small refiners. After some hesitancy, the technical staff in the program office accepted the innovative approach, and the agency used it in the final rule.

While there are no doubt other striking examples of innovative contributions of agency regulatory analysts, in none of the other three case studies undertaken in connection with this report did the regulatory analysis office play a significant options identification role. For example, the options that go forward for special high level review during EPA's unique options selection rejection review process originate almost exclusively in the program offices.[22] In most cases technical judgment and experience appeared to dominate the options identification effort.

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[21] See, G. Edwards and I. Sharkansky, The Policy Predicament: Making and Implementing Public Policy 121 (1978).

[22] See, Chapter 3, at Notes 994-1003 (EPA); Chapter 3 at Notes 235-240 (ASCS). But see, Chapter 3 at Notes 903-907 (EPA - Office of Drinking Water); Chapter 3 at Section 3.a. (APHIS).

Few of the program office staff personnel interviewed in connection with this Report could remember instances in which regulatory analysts identified innovative options that the program office had not already explored.[23] Indeed, even the regulatory analysts interviewed could not think of very many particularly innovative options that their offices had identified.[24] Personnel from both offices, however, cautioned that subordinate decisionmaking entities often operated in such a way that it was impossible to identify a single source of innovative options that emerged from group interactions.[25] It may be, for example, that regulatory analysts are especially effective at stimulating thought about innovative options in lower level "brainstorming" sessions.[26] In addition, the apparent failure of agency regulatory analysts to identify innovative options may simply reflect the fact that in some agencies the regulatory analysts have not been assigned an options identification role.[27]

In sum, while it is difficult to draw firm conclusions about how effectively regulatory analysts have played an options identification role, it seems reasonably clear that they have not had a profound impact on agency decisionmaking in this regard. While greater attention to this potentially valuable role in structuring the agency decisionmaking process might enhance the effectiveness of analysts in playing this role, the absence of strong evidence that regulatory analysts have greatly affected agency decisionmaking in agencies (like EPA and NHTSA) in which the analysts have explicitly been assigned that role suggests that the gains from restructuring the decisionmaking with this goal alone in mind may be relatively modest.

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[23] See, e.g., Chapter 3, at Notes 1000-1003 (EPA); Chapter 3 at Section 1.a. (USDA, FSIS).

[24] See, Chapter 3, at Notes 1000-1007 (EPA); Chapter 3 at Section 1.a. (USDA, FSIS); Chapter 3 at Notes 390-394 (FAA).

[25] See, Chapter 3, at Notes 1004-1007.

[26] See, Chapter 3, at Notes 1000-1003.

[27] Meltsner points out that "[a]nalysis cannot be expected to be an innovative force by itself. Somebody has to want it." Meltsner, supra note 3, at 291.

E. Institutional Skeptic.

Although skepticism is not automatically programmed into a regulatory analyst during his or her education, analysts in many of the agencies studied in connection with this report had a strong perception of themselves as "institutional skeptics."[28] In this role the regulatory analyst is responsible for probing carefully the logic and the factual and policy bases for the agency's rulemaking activities. The regulatory analysts can challenge the conventional wisdom and insist that technical staff in the program office justify regulatory choices by explicit reference to facts and policy considerations.[29] Regulatory analysts can probe assumptions, question inferences, and challenge extrapolations. In the process, they can pay attention to the policies that the technical staff is implementing either explicitly in the rulemaking documents or implicitly in the assumptions that it adopts for its models and the inferences that it draws from scientific and technical data.

It is probably a great tonic to the technical staff in the program office to know that its efforts will be reviewed by an institutional entity charged with the task of critically assessing that work and measuring it against current agency policy. The certainty of such review can provide an incentive for the technical staff to hone arguments and to anticipate and refute counterarguments prior to publicizing its position. An institutional skeptic can also help ensure that the program office does not attempt to gloss over informational gaps.

A critical review of the technical work can enhance accountability by helping upper level decisionmakers identify instances in which the technical staff has substituted policy judgment for uncertainties. By keeping a constant eye out for implicit policymaking at the technical level, an institutional skeptic can make upper level decisionmakers aware of the extent to which the rationales for individual rules implement particular policies. Finally, an institutional skeptic can in some instances prevent the agency from promulgating ill-considered rules that it may later have to withdraw, thereby conserving agency resources in the long run.

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[28] See, Chapter 3 at Notes 334-340 (NHTSA); Chapter 3 at Notes 141-151 (FSIS); Chapter 3 at Notes 1345-1351 (GOA, Office of Policy Analysis). Meltsner refers to policy analysts as "institutional gadflies." Meltsner, supra note 3 at 292-93.

[29] See, Benveniste, supra note 5, at 93; Meltsner, supra note 3, at 261, 293; Chapter 3 at Notes 334-337 (NHTSA).

An agency's institutional skeptic need not be the regulatory analysis office. Persons with training in economics and policy analysis are not the only professionals capable of taking a skeptical look at the rationales for agency rulemaking efforts. The Office of General Counsel in many agencies has performed this role and continues to perform it quite apart from the regulatory analysis office. Still, regulatory analysts can bring a unique perspective to the review effort that the Office of General Counsel may lack. The regulatory analysis office is skeptical of commands and controls as vehicles for technological change. That office has a penchant for flexibility, and it is unsympathetic to the rigidities that the enforcement office and the Office of General Counsel often insist upon to ensure that agency rules are enforceable.

Employing the regulatory analysis office as institutional skeptic can give rise to acrimonious intra-agency disputes. No one likes for his or her work to be reviewed critically, and the technical staff in the program office can be expected to react defensively to outside criticisms, however legitimate they may be in reality. When the regulatory analysis office plays an institutional skeptic role, the technical staff in the program office is likely to perceive the regulatory analysis office as an officious stumbling block intent on interfering with the program office's obligation to promulgate rules in a timely fashion. Yet if the work of the program office is legitimately subject to criticism, then it may be better for the agency to subject it to internal criticism before it is reflected in the rationale for a rule and becomes subject to outside criticism.

Another, more subtle, disadvantage of the institutional skeptic role derives from the fact that in a technical regulatory area that is fraught with uncertainty, virtually any technical analysis can be subject to devastating criticism by a determined skeptic. There are limits, in other words, to which carping at a document that is admittedly based upon poor information and large assumptions is a useful enterprise. It cannot make the data any better without delaying the effort, perhaps interminably. Moreover, it cannot ensure a "better" decision, because the uncertainties are so large that there are few objective criteria for a "good" decision.

Regulatory analysts acknowledge that skepticism has its limits and, pressed too far, can be counterproductive. Nevertheless, they argue that a healthy dose of skeptical review by an office that is not committed to a particular regulatory posture can be very useful to the agency's goal of promulgating rules that are capable of surviving political and judicial review. Agency administrators in many agencies seem sufficiently convinced of the value of this role for the regulatory analysis office that they have at least allowed agency regulatory analysts to play it, even when they have not explicitly assigned it to the regulatory analysis office.

F. Advocate for Efficiency.

Regulatory analysts in many agencies believe that their role goes beyond skeptical review of the work of the program office to that of institutional advocate for efficiency.[30] Under this view of the role of the regulatory analyst, which Lindblom defines broadly as "partisan analysis,"[31] the analyst has an obligation to advocate presumably more efficient market-oriented solutions to regulatory problems.[32] Assigning an institutional entity the role of advocate for efficiency represents a conclusion by upper level decisionmakers that the rulemaking process, in the absence of such an entity, would be inclined to burden the regulated industries with inefficient rules. Upper level decisionmakers may believe that the technical staff in the program offices are insufficiently concerned with the costs that the agency's regulations impose upon society, or they may share a philosophical belief that governmental regulation should play a less extensive role in the economy. Under either view, agency heads may assign regulatory analysts an advocacy role out of a conviction that bureaucratic thinking can become so encrusted

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30 Comments of Mr. Anthony E. Goldin, Director, Directorate of Policy and Mr. Larry Braslow, Chief of Economics, Office of Regulatory Analysis, Directorate of Policy, Occupational Safety and Health Administration, DOL, April 9, 1985, made on an earlier draft of this report; Chapter 3 at Notes 723-725 (OSHA); Chapter 3 at Note 539 (NHTSA); analysts in other agencies resist an advocacy role. See, Chapter 3 at Notes 390-396 (FAA).

31 C. Lindblom, The Policy Making Process 33 (1968).

32 See, Behn, supra note 16; Foster, supra note 16.

with conventional thinking that it takes an effective advocate of a different way of thinking to produce noticeable changes in the way that their agencies go about making decisions.[33]

The regulatory analysis office is well-suited for this advocacy role. Most of the professionals in the regulatory analysis office received a heavy dose of traditional economics in their training. The standard economics approach to regulations is fairly suspicious of command and control regulatory tools, and it is quite partial towards market-oriented tools that can in theory reach the same regulatory goals at less expense. The fact that many regulatory analysis offices in the agencies had their origins in offices that were historically assigned the economic impact assessment role also gives the inhabitants of that office a healthy regard for the costs that regulations impose upon regulated industries. This cost-oriented perspective can be at odds with the benefits oriented perspective of the technical staff in the program offices. Hence, to the extent that upper level decisionmakers desire to have their decisions reflect a market-oriented perspective that is sensitive to the costs that regulations impose upon society and to the extent that they are not capable of monitoring the decisionmaking process carefully enough to ensure that staff recommendations are reflecting that perspective, assigning the regulatory analysis office an advocacy role in the subordinate decisionmaking entities can help ensure that that point of view informs staff output.

Assigning an advocacy role to the regulatory analysis office, however, has disadvantages. Perhaps the most important disadvantage stems from the fact that the advocacy role can clash with the analyst's other roles of impartial provider of information and institutional skeptic. If the regulatory analyst is an advocate of particular regulatory approaches or results, other participants in the decisionmaking process and the beneficiaries of the regulatory program are likely to question the neutrality of the information and analysis that the analyst provides.[34] For example, the regulatory analyst

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[33] See, Edwards & Sharkansky, supra note 21, at 119, 248; Jenkins-Smith, supra note 4, at 89.

[34] Professor Meltsner suggests that there is a "basic incompatibility between the roles of analyst and advocate." Meltsner, supra note 3, at 284. He points out that

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who is assigned the role of efficiency advocate may tend to overemphasize costs in his or her role of information analyst. In addition, the regulatory analyst cannot effectively play the role of institutional skeptic if other parties to the decisionmaking process perceive that the skepticism is not motivated by a detached concern for the integrity of the agency's reasoning process, but rather comes from a particular policy perspective.[35] Likewise, the policy analysis role may be rendered less effective by the perception that the analyst is advocating policy rather than measuring alternatives against existing policy.

Some regulatory analysts are uncomfortable in the role of policy advocate. It is one thing, in this view, to suggest how various options further various policies, and it is quite another thing to advocate particular regulatory policies.[36] In this sense, assigning an advocacy role to the regulatory analyst is asking him or her to perform a function that goes beyond his or her formal training. Unlike law schools, policy analysis schools and economics departments do not train their pupils in effective advocacy, and advocacy is rarely listed as one of the characteristics of a well trained policy analyst. Hence, assigning an advocacy role to the regulatory analysis office may be asking too much of it.

Yet it is undeniable that many analysts in the regulatory agencies come to their positions with a perceived mission, and they devote much of their energies toward accomplishing particular substantive ends. While lacking formal training in advocacy, regulatory analysts can prove very persuasive to upper level decisionmakers. Indeed, it is fair to say that in

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> The more the analyst pushes the client's preferences, and the more he tries to be persuasive and gain acceptance, the more he will encounter ethical choices. The more active he is politically, the more he will be in conflict with his analytical standards of behavior.

Meltsner, supra note 3, at 284.

35 See, Meltsner, supra note 3, at 258.

36 See, Meltsner, supra note 3, at 53; Chapter 3 at Section 3.a. (APHIS).

many agencies, such as EPA and NHTSA, the regulatory analysts have become such effective advocates of substantive policies that the agencies' regulatory output has been profoundly affected by their efforts. Whether one views this advocacy role as an encouraging or discouraging development depends upon one's substantive views about the role of regulation in society.

G. Influential Determinant of Agency Policy.

There can be little doubt that the regulatory analysis requirements of the recent executive orders has significantly enhanced the power of the regulatory analysts in the regulatory agencies.[37] Although most regulatory analysts probably do not aspire to a direct policymaking role,[38] the regulatory analysis office in many agencies has been structured into the decisionmaking process in such a way as to give that office a direct role in the determination of agency policy.[39] In this role, the regulatory analysts shape the agency's policy preferences as well as measure various regulatory options against pre-existing policy preferences.[40] When the regulatory analysis office must be represented on subordinate and upper level decisionmaking entities, when the representative from that office is generally a strong advocate of particular regulatory policies, and when the agency implements those policies with some frequency, then the regulatory analysis office has departed significantly from the role of information and options provider and impartial skeptic to assume the role of policymaker.[41]

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[37] See, Miller, Lessons of the Economic Impact Statement, Regulation 14 (July/August 1977).

[38] See, Meltsner, supra note 3, at 7; Kelly, The Expert as Historical Actor, 92 Daedalus 543 (1963); Chapter 3 at Notes 395-396 (FAA). But see Behn, supra note 16.

[39] The regulatory analysts in the Office of Policy, Planning and Evaluation in EPA are in many cases influential determinants of agency policy. See, Chapter 3 at Notes 1338-1381. The regulatory analysts in the program offices, however, may or may not play an influential role. Compare Chapter 3 at Notes 903-907 (Office of Drinking Water) with Chapter 3 at Notes 907-921 (Office of Air Planning and Standards).

[40] See, Meltsner, supra note 3, at 263-64.

Regulatory relief proponents encourage regulatory analysts to make regulatory policy. To the extent that regulatory analysts are generally disinclined to intervene into the marketplace with regulatory controls, assigning them an affirmative policymaking role in regulatory agencies will probably operate to stem the flow of new regulations. Making the regulatory analysts influential determinants of agency policy should also increase the extent to which regulatory decisions reflect comprehensive analytical rationality. If the regulatory analysts become influential determinants of agency policy, the regulatory analysis documents are not likely to be ignored or abused.

The foregoing analysis of some of the disadvantages of assigning regulatory analysts an advocacy role, however, anticipates some of the problems that have arisen in agencies that have gone farther to assign the regulatory analysts a more influential role in determining the content of agency policy. Like the advocate role, the influential determinant role conflicts with the roles of information provider, institutional skeptic, and policy analyst. The objectivity and neutrality of a partisan proponent of a particular policy is especially open to question when the advocate is also in a position to affect the ultimate decision. There is indeed something of a conflict of interest between the analyst as analyst and the analyst as decisionmaker.

Making the regulatory analysis office an influential determinant of agency policy has obvious implications for institutional power relationships. An institutional entity that controls information has institutional power. The regulatory analysis offices supply a large amount of the information that the agency uses in promulgating rules, especially on the cost side of the equation. If the provider of information is also made an influential determinant of agency policy, the information providing role can be used to enhance the institutional power of that office.[42] This enhanced institutional power can operate to further the policy goals of the upper level decisionmakers and of Congress, but it can also be manipulated to further the individual goals of the individual regulatory analysts or the goals of persons or institutions outside the agency.[43]

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[41] See, Chapter 3 at Notes 534-538 (NHTSA); Chapter 3 at Notes 1338-1381 (EPA, Office of Policy Planning and Evaluation) The amount of influence that the regulatory analysis has on the decisionmaking process can depend upon the nature of the rule. In FSIS, for example, the regulatory analysis office plays a very influential role for those rules specially designated by the Andministrator to receive high level treatment. That office is not as influential in promulgating other less important rules. See, Chapter 3 at Section 1.a.

Making the regulatory analysis office an influential determinant of agency policy may pose a serious threat to the integrity of the policy analysis "profession." So long as the profession practices neutral policy analysis, it has some distinct contours. When it expands its professional baliwick into policymaking, it begins to lose definition. At some point in the growth of the regulatory analysis office's institutional power, policy analysis becomes indistinguishable from politics. Although many students in schools of public affairs no doubt aspire to careers in politics, policy analysis has attempted to set itself off from politics as a distinct profession. When a policy analyst becomes a policymaker, he or she begins to lose that distinctive quality that defines him or her as a policy analyst. Spread throughout several agencies, this role dilution could pose a serious threat to the efforts of this fledgling profession to define itself with sufficient clarity to give it an enhanced status in society.

[42] See, Benveniste, supra note 5, at 90. ("It is not irrelevant that the control of facts can often be translated into social power.")

[43] See, Meltsner, supra note 3, at 210. Professor Benveniste correctly observes that:

> [E]xperts acquire power of their own, either because the knowledge they have can be translated into power, because they can influence the [decisionmakers], because they can create a coalition of supporters, or because the scope and the procedures of the planning process are expensive enough to make it difficult for those who are left out to intervene and counterattack. As a result, experts can acquire considerable influence, and when they do, they should not be surprised when this influence is resented.

Benveniste, supra note 5, at 159.

III. Timing of Regulatory Analysis.

The effectiveness of the regulatory analysis office in playing an assigned role will depend upon the timing of the analysis. The timing of the regulatory analysis input will in turn depend upon the role that upper level decisionmakers assign to regulatory analysts. If, for example, the agency plans to use its regulatory analysts primarily in a justifier role, then it is not important that the analysis be completed until after the decisionmaking process has been completed. Indeed, it is probably preferable that the analysts not begin to prepare a regulatory analysis until after the upper level decisionmakers have decided upon a particular regulatory approach that needs justification. If, however, upper level decisionmakers want agency regulatory analysts to play a more meaningful role in the internal decisionmaking process, they will have to pay some attention to the timing of analytical input in structuring that process.

If the agency plans to use its regulatory analysts in an information-provider role, it faces a trade-off between its informational needs and its limited analytical resources. The economic impact and benefits analyses that agency analysts typically provide should be available to subordinate decisionmaking units prior to the time that they begin active deliberations on the alternatives that they will recommend to upper level decisionmakers.[44] This suggests that the regulatory analysts should be informed of the options that the agency is actively considering early in the process, so that the economic impact and benefits information is available to the subordinate decisionmaking unit at about the same time that other technical information becomes available. Moreover, to the extent that the analysts will have to contract for the production of original data, they should be involved early in the rulemaking effort at the time that research needs are determined.

It is not especially important, however, that the formal regulatory analysis documents be available to subordinate decisionmaking entities prior to their deliberations, so long as the information itself is before them either in the form of contractor reports or oral or written communications from the regulatory analysis office. Subordinate decisionmaking units have less need for an easily assimilated display of information than upper level decisionmakers and the public. Moreover, it is probably best that the formal documents not be drafted until after the program office has analyzed the information that it has assembled. The formal regulatory analysis document is more important for upper level decisionmakers and external review.

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[44] See, Meltsner, supra note 3 at 261; Telephone Interview with Mr. Albert Nichols, Acting Director, Economic Analysis Division, Office of Policy Analysis, Office of Policy, Planning and Evaluation, May 22, 1984 [hereinafter cited as Nichols Interview]; Telephone Interview with Ms. Jennifer Silk, Directorate of Health Standards Programs, Occupational Safety and Health Administration, DOL, April 30, 1984 [hereinafter cited as Silk Interview]; Chapter 3, at 879-883.

The desirability of gathering data at an early stage in the evolution of a rule must be tempered, however, by a concern for conserving limited analytical resources. If, for example, the regulatory analysis office begins extensive economic impact information-gathering efforts prior to the time that the engineers in the program office have completed rudimentary feasibility studies, the analysts may wind up studying the economic impact of alternatives that are precluded on technological feasibility grounds. On the other hand, if the analysts wait too long until regulatory options have thoroughly crystalized, the rule development process may be delayed as the analysts attempt to gather information and perhaps contract for studies on the well-developed options.[45] In practice, this trade-off means that the regulatory analysis office must design a system that is capable of providing a relatively rapid response to a broad range of inquiries. This system may not be well suited for providing comprehensive analyses of particular options.[46]

The agencies might attempt to resolve this dilemma by "phasing" the information analysis to reflect the seriousness with which subordinate decisionmaking entities are considering particular options at particular times. Under this approach, the regulatory analysis office could examine a large number of feasible options in a very cursory "back-of-the-envelope" fashion very early in the process, before very many alternatives were eliminated. This early first-cut analysis, which would require very little information gathering, might eliminate several options on economic feasibility grounds. Later, as the subordinate decisionmaking unit rejected more options, the intensity of the analysis could increase. The "phasing" approach to timing regulatory analysis input would ensure that many options received at least some attention from the agency's regulatory analysts, while at the same time ensuring that serious alternatives received serious analysis.

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[45] Telephone Interview with Mr. Henry Thomas, Ambient Standards Branch, Strategies and Air Standards Division, Office of Air Quality Planning and Standards, Office of Air and Radiation, EPA, May 25, 1984 [hereinafter cited as Thomas Interview].

[46] Thomas Interview, supra note 45.

Early access to the decisionmaking process is probably even more important if the analyst is to play an options-identification role. If upper level decisionmakers expect agency regulatory analysts to identify innovative options for use in the decisionmaking process, the analysts must have access to subordinate decisionmaking entities very early on before even the technical staff in the program office has set its research agenda. Otherwise, an innovation option from the regulatory analysis office will face a substantial hurdle, because serious consideration of the option will no doubt require further information and research.

There are two resource constraints upon this early infusion of analytical input on options. First, it will consume the resources of the regulatory analysis office. Yet this consumption of resources will surely be warranted if the analysts have something important to contribute. We have, however, observed that upper level decisionmakers should not set their expectations for regulatory analysts too high in this regard. While it is possible that the analysts will suggest innovative options to the program office, most options originate in the technical staff of the program offices even in programs that have their own regulatory analysts.

A second constraint is the resources that the program office may have to consume in exploring the technical aspects of options that the regulatory analysis office identifies. While the possibility that an option will have to be studied is, of course, no reason to rule out an options-identification role for agency regulatory analysts, the decisionmaking process should be structured so as to place some reasonable constraints upon the extent to which the agency technical staff is required to gather information and analysis on options. As program office employees interviewed in connection with this Report often observed, there can be an infinite range of possible solutions to a regulatory problem, but at some point the agency must quit studying options if the rulemaking process is to function at all. One possible solution to this dilemma is to structure the participation of the regulatory analysts into the process at a very early stage in the decisionmaking process, and at the same time structure the process in a way that secures high level input before any option is explored in great detail. On the basis of recommendations from both the program office and the regulatory analysis office, high level agency officials can then narrow the range of options to a reasonable number that both offices can study within their own resource constraints.[47]

The regulatory analyst who is playing only a policy communication role need not become involved in the process much before the subordinate decisionmaking entities have completed their deliberations. In this role, the analyst's main function is to communicate to upper level decisionmakers the extent to which regulatory options advance particular agency goals. While the policy communication function could be helpful to subordinate groups in formulating their recommendations to upper level decisionmakers, it is not essential to their function. It is, however, important to communicate the policy implications of the regulatory options that the subordinate group selected to ensure their accountability to agency management.

Presumably, however, the analyst who is assigned a policy communication role will also be assigned an information-gathering role. Thus, it is likely that the analyst will already be involved in the subordinate decisionmaking process at the time it becomes appropriate to undertake a policy analysis of the regulatory options that survived low level review. The analyst can be ascertaining relevant agency policy and measuring existing options against those policies at the same time that the analyst is gathering economic impact and benefits information. Thus, for the regulatory analyst to play an effective policy communication role, the timing of the analytical input need not differ from the timing of the information-providing role.

The same is true of the roles of analysts as advocates and influential determinants of agency policy. While is is not essential that either of these roles be structured into the decisionmaking process until just before upper level decisionmakers are ready to choose from among the available options, as a practical matter the analysts will usually be involved in the process long before then if they are to play any significant role at all. Still, it is important that the analysts play their advocacy and policymaking roles (to the extent that they have been assigned those roles) while they are engaged in their information-providing role in subordinate decisionmaking units. If the regulatory analysts remain silent during internal discussions in subordinate decisionmaking units, they are subject to legitimate criticism from those who actively participated at that stage if they begin to play their advocacy or policymaking roles late in the process when serious consideration of their alternative means returning to the drawing board.

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[47] An example of such a structure is the high level options review intermediate model discussed infra at pp. V - 69-72.

IV. Four Models for Structuring Regulatory Analysis into the Agency Decisionmaking Process.

The position of the regulatory analysis office in an agency can say a great deal about the role that upper level decisionmakers have assigned to regulatory analysis in the decisionmaking process. We have seen in Chapter 3 that agencies have adopted a wide variety of approaches toward structuring regulatory analysis into the decisionmaking process. Indeed, widely varying approaches have been adopted for different agencies within a single department. Yet despite this variety, the approaches toward structuring regulatory analysis into the decisionmaking process generally fall within four broad models -- the hierarchical model; the outside advisor model; the team model; and the adversarial model. This section of the Report will describe and analyze the four models and one hybrid model -- the upper level options review model -- that has evolved in the Environmental Protection Agency, and it will suggest some criteria to guide decisionmakers in choosing from among these models for structuring regulatory analysis into the decisionmaking process.

One aspect of the decisionmaking process that is very strongly affected by agency structure is policy communication between upper level decisionmakers and bureaucrats in the subordinate decisionmaking entities. One goal of the structuring process might therefore be to facilitate policy communication. Other goals can likewise be affected by agency decisionmaking structure. For example, the extent to which the agency brings comprehensive analytical rationality to bear upon regulatory problems can obviously be affected by agency structure. If the regulatory analysis office is tucked away in the agency hinterlands, comprehensive analytical rationality is not as likely to play a large role in agency decisionmaking.

Similarly, to the extent that an agency's regulatory analysts are the agency's chief proponents of regulatory relief, they will not have much impact on agency policy if their office is out of the lines of decisionmaking authority on the agency's organizational charts.

The analysis in this chapter is predicated upon the assumption that agency structure can have an important impact upon the substantive output of the decisionmaking process.[48] This assumption is not uncontroversial. Many have cautioned against overly optimistic reliance upon organizational change to reach substantive reforms.[49] Yet we have seen in Chapter 3 that many regulatory analysts in the agencies have concluded that the establishment of separate regulatory analysis offices in response to the regulatory analysis requirements of the recent executive orders has resulted in substantive changes in agency policy output.[50] The early requirements of Executive Orders 11821 and 12044 obliged the agencies to establish institutional entities capable of preparing detailed economic impact analyses, and the additional cost-benefit analysis requirement of Executive Order 12291 required agencies to hire staff with expertise in benefits analysis. This chapter will explore how the way in which an agency structures this new staff into the decisionmaking process can affect the substantive output of that process.

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[48] See, Edwards & Sharkansky, supra note 21, at 118-19; Meltsner, supra note 3, at 13.

[49] See, e.g., Mazmanian & Nienaber, Can Organizations Change? 2 (1979) ("The literature on organizational change reflects a profound pessimism about the likelihood of directing bureaucracies, let alone redirecting them."); Regulatory Procedures Act of 1981: Hearings on H. R. 746 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 75 (1981) [hereinafter cited as 1981 H.R. 746 Hearings] (testimony of Mr. Richard Berg).

[50] Observers of the process of implementing the National Environmental Policy Act's environmental impact statement requirements have reached similar conclusions. See, Wichelman, Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Deferential Response, 16 Nat. Res. J. 263, 280-84 (1976).

A. The Hierarchical Model.

Many agencies reacted in only very minor institutional ways to the requirements of the executive orders. Several agencies simply added the task of preparing regulatory analysis documents to the job descriptions of the technical staff. In those agencies the same staff employee who drafts the rulemaking documents drafts the regulatory analysis documents. The regulatory analysis then winds its way up the agency chain of command along with the other rulemaking documents. Under this "hierarchical model" the technical staff and the superiors at each level in the agency hierarchy responsible for the rule can become aware of the information and analysis that the executive orders require, but there is no separate institutional entity charged with producing regulatory analysis documents, skeptically reviewing rulemaking documents, and generally carrying the flag for comprehensive analytical rationality.

Perhaps the best example of the hierarchical model in the agencies studied in connection with this Report is the process that has evolved in the Agricultural Stabilization and Conservation Service in USDA. As we observed in Chapter 3, the responsibility for drafting both rulemaking and regulatory analysis documents in that agency devolves to the "commodity program specialist" in one of the commodity program offices. The commodity program specialist prepares the lengthy memorandum that suggests the options for consideration at a meeting of high level agency and Departmental personnel. The specialist memorializes the discussions that take place at these sessions. He or she then prepares the rulemaking and regulatory analysis documents with minimal review from the Regulatory Impact and Executive correspondence staff and a somewhat more extensive review from the Departmental Office of Budget and Program Analysis. The information in the documents is drawn largely from other Services in the Department, and the commodity specialist takes this information largely at face value.

The hierarchical model is also followed in the Agricultural Marketing Service in USDA. An employee in a commodity division drafts both the rulemaking and regulatory analysis documents. The analyses are subject to little scrutiny within the agency, but the regulatory analysis documents for formal rules can be subject to intense scrutiny in the formal rulemaking hearings.

The hierarchical model has governed rulemaking initiatives in the Food Safety and Inspection Services in USDA for some minor rules that do not receive the special attention of the Administrator at that agency. In the past, the program office has not attempted to coordinate options-identification and document-drafting activities with the regulatory analysis office on "top down" minor rules that are not designated by the Administrator to receive special attention. For other rules, the agency has adhered to the team model in which the regulatory analysis office plays a co-equal role. The organizational structure at an agency, therefore, need not dictate the model that the agency employs in a particular rulemaking context. The fact that an agency has a separate regulatory analysis office does not mean that it will not follow a hierarchical model that ignores that office in particular rulemaking efforts.

The hierarchical model considerably eases the internal friction involved in producing and reviewing regulatory analysis documents. When the program office can gather information, and draft cost and benefits analyses, without the critical review of an independent regulatory analysis office, its job is much simplified. For rules that raise predominantly economic concerns on both the costs and benefits sides of the ledger, a single program staffer is probably capable of analyzing the economic pros and cons of several regulatory options without the aid of other trained economists. It may well be that upper level review, as the rule and its rationale move up the hierarchy, provides a sufficient critical perspective on the work of the lower level technical staff.

The hierarchical model, however, does not ensure that comprehensive analytical rationality is brought to bear upon regulatory decisions. First, the hierarchical model does not possess a separate institutional entity charged with suggesting innovative options. The model provides no assurance against the "tunnel vision" with which bureaucrats are often charged. Yet interjecting a broad range of perspectives into the hierarchical decisionmaking process at critical junctures, such as the ASCS's policy guidance sessions, can help alleviate this problem. Moreover, it is not clear that the input of a separate regulatory analysis office will necessarily result in making a broader range of options available to upper level decisionmakers. For most agencies studied in connection with this Report, most of the usable options were generated by the technical staff.

Second, the hierarchical model does not have an independent entity to insist that regulatory options be measured against ascertainable agency policy goals. The hierarchical model is therefore particularly susceptible to decisionmaking by precedent without periodic re-examination of first principles. For example, regulatory analysts in the early days of the regulatory analysis office in the Food Safety and Inspection Service in USDA discovered that under the pre-existing hierarchical decisionmaking mechanism, agency employees in the program office were often unaware of the policies that were supposed to be guiding their efforts.[51] Some measure of accountability can be lost in a decisionmaking process that lacks an effective policy communicator.

Third, the hierarchical model lacks a designated institutional skeptic. While it is possible that the technical staffer charged with drafting the rulemaking and regulatory analysis documents for a rule is capable of independently analyzing his or her own ideas and analyses, he or she is not as likely to see gaps in data or reasoning that may undermine the economic and technical rationale for a rule. There will also be a tendency to use regulatory analysis documents as vehicles to justify decisions reached on other grounds. While upper level decisionmakers and their staffs can bring an independent perspective to bear on the rationale for a rule, they may not be able to devote sufficient attention to a rule to provide an effective critical perspective. A rule that leaves the agency without the review of a designated institutional skeptic may attract critical OMB or public comment and have to be retracted or amended.

Even if a rule receives a thorough skeptical review as it moves up the institutional hierarchy, the hierarchical model exerts great pressure against reacting substantively to criticisms of the technical staff's reasoning. Ordinarily, the technical staff has received a clear indication of the result (or at least a very narrow range of options) that the upper level decisionmakers would like to reach prior to drafting regulatory analysis documents. Once the staff has developed a rationale to support the favored result, to critique that rationale or to suggest a different result during the hierarchical review process is to force the staff "back to the drawing board." Too many trips "back to square one" can waste staff resources and destroy staff morale.

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[51] Segal Interview, supra note 2.

In addition, the rationale for a rule may even become distorted as it moves up the hierarchy without the continuing input of an institutional skeptic. Professors Edwards and Sharkansky observe that

> [M]ost bureaucracies have a hierarchical structure, and the information on which decisions are based usually passes from bottom to top. At each step in this ladder of communication personnel screen the information from the previous stage. This is necessary because decisionmakers cannot absorb all the detailed information that exists on an issue. Some policymakers, like President Eisenhower, have demanded that subordinates summarize and synthesize information as it proceeds upwards. The longer the communication chain, the greater the chance that judgments will replace facts; nuances or caveats will be excluded; subordinates will paint a positive face on a situation to improve their own image or that of their organization; human error will distort the overall picture; and the speculations of "experts" will be reported as fact.[52]

The hierarchical model can thus impede the flow of innovative options and important information to upper level decisionmakers.[53]

Finally, the hierarchical model does not contain an institutional efficiency advocate. If one of the regulatory reform goals of the recent executive orders is to achieve regulatory relief by making rules more efficient and less burdensome, it may not be enough merely to send that message to the technical staff that has historically written and explained agency rules. A separate institutional advocate may be required. On the other hand, as we have seen, it may be that the agency's regulatory mandate is sufficiently clear that the agency has little discretion to adopt less burdensome approaches. In addition, a less burdensome approach may less effectively serve a statute's beneficiaries. If so, then an institutional efficiency advocate is likely to antagonize beneficiary groups while adding little value to the decisionmaking process.

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[52] Edwards & Sharkansky, supra note 21, at 133.

[53] Edwards & Sharkansky, supra note 21, at 133.

B. The Outside Advisor Model.

A second model of the regulatory analysis process casts the regulatory analyst in the role of "outside advisor". Unlike the hierarchical model, the agency in the outside advisor model contains a separate office devoted at least in part to regulatory analysis, but that office has no formal role in the decisionmaking process. It lacks institutional power, because it is not necessarily included in subordinate decisionmaking entities and because it does not have "sign-off" authority. Indeed, it need not even draft the agency's regulatory analysis documents. Under this model, the regulatory analysis office is an outside advisor that is called upon only when needed by other decisionmaking units -- it speaks only when spoken to.

The best example of the outside advisor model among the agencies studied in connection with this Report is the regulatory process in the Animal and Plant Health Inspection Service (APHIS) in USDA.[54] In that agency, rules originate in the program offices, and regulatory options are identified in those offices. The program offices also gather the technical and economic information necessary to support most agency rules. The Regulatory Coordination Staff, which consists mostly of attorneys, then drafts the rulemaking and regulatory analysis documents.

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[54] See, Chapter 3 at Notes 229-230. The decisionmaking process in the Federal Aviation Administration in DOT also fits the outside advisor model in many regards. Although the agency has adopted a team model for regulatory decisionmaking, the regulatory analysts in the Office of Aviation Policy and Plans will be represented on decisionmaking teams only if the accountable directorate requests its presence. Yet since the accountable directorates know that upper level decisionmakers in the agency will usually insist that the team produce a document detailing the costs and benefits of several regulatory options, a representative from the office of Aviation Policy and Plans will usually be invited to team meetings and will therefore usually prepare a regulatory analysis document for the team. See, Chapter 3 at Notes 541-549.

APHIS has a small Policy Analysis and Program Evaluation Staff, composed of persons with training in economics or policy analysis. That staff must review formal RIAs and RFAs, but the agency almost never has to promulgate these formal documents. Otherwise, the Policy Analysis and Program Evaluation Staff participates in the rulemaking process only to the extent that a program office or the Regulatory Coordination Staff requests its help.

The Policy Analysis and Program Evaluation Staff has generally not been invited to the meetings of the program offices staff and the Regulatory Coordination Staff in which options are identified and narrowed and rationales are conceived. Only rarely is the Policy Analysis and Program Evaluation Staff asked to draft a regulatory analysis, and these instances are, in the opinion of at least one member of that staff, limited to rules for which the program office has a particular need for an economic justification for a rule.

Although there is some difference of opinion over the extent to which the program offices and the Regulatory Coordination Staff rely upon the Policy Analysis and Program Evaluation Staff primarily as a post hoc justifier for decisions previously reached, it is clear that that staff is only a very marginal participant in the decisionmaking process. When the services of the agency analysts are requested, they do act as advocates for efficient solutions to regulatory problems. Their services are so rarely requested, however, that their efficiency-oriented outlook does not greatly affect the agency's overall regulatory posture. The Director of the Regulatory Coordination Staff is quite convinced that the benefits of the agency's rules so obviously outweigh the costs that detailed analysis of costs and benefits would in most cases be superfluous. Because regulatory options have usually been narrowed by the time that the Policy Analysis and Program Evaluation Staff enters the process, the analysts play little role in the options-identification process. The analysts perform an information-analysis role only for rulemaking efforts in which they become actively involved.

The primary advantage of the outside advisor model is that it allows the program office and upper level decisionmakers to take advantage of the information and analysis that regulatory analysts can provide without allowing them to dominate the decisionmaking process. The outside advisor effectively prevents the regulatory analysts from playing an advocacy role and from becoming influential determinants of agency policy in the guise of neutral providers of information.

Upper level decisionmakers who are sensitive to the limitations of regulatory analysis and who are willing to take responsibility for the policy aspects of their decisions may prefer the outside advisor model, because it allows the regulatory analyst to measure regulatory options against agency policy without delegating significant decisionmaking authority to the regulatory analysis office. The outside advisor model also conserves valuable analytical resources for rulemakings in which they are really needed. The technical staff in the program office are also likely to favor the outside advisor model, because it constrains the bureaucratic power of a competing organizational entity. Even some regulatory analysts may prefer this model, because it recognizes the legitimate limits of the policy analysis profession and does not attempt to foist off unpopular policy choices on the regulatory analysis office.

Most regulatory analysts, however, will probably resist being placed in the limited role of outside advisor, even though there is nothing in the formal discipline that suggests that regulatory analysts should be anything more than a consultant to a policymaking client. For the most part regulatory analysts have chosen their profession out of an attraction to the policymaking process. Like many of the technical staffers in the program offices, most regulatory analysts probably aspire to becoming influential within the bureaucracy of which they are a part. Perhaps more than the technical staff, many members of the regulatory analysis staff come to the regulatory effort with definite ideas about the role of regulation in society, and they would like to see those ideas implemented in practice. While an outside advisor can become influential in particular cases, the regulatory analysts may prefer a more systematic role in the day-to-day decisionmaking process.

Beyond frustrating the policymaking aspirations of the regulatory analysis staff, a significant disadvantage of the outside consultant model is the danger that it will use regulatory analysis merely to justify decisions previously reached on other grounds.[55] Analysis is handy for "papering over" decisions by providing an acceptable rationale for decisions reached on other grounds. The data available for much regulatory decisionmaking are clouded with sufficient uncertainties that it is relatively easy for an experienced analyst to produce a rationale for almost any decision within a very broad range of possibilities. Yet most regulatory analysts would regard post hoc rationalization as an abuse of analysis and a threat to the integrity of the profession. Perhaps more importantly, using regulatory analysts in the role of outside advisors to justify decisions previously reached reduces the accountability of the politically appointed decisionmakers to reviewing institutions and the public.

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[55] See, Chapter 3, at Notes 152-154

Another significant disadvantage of the outside advisor model is its failure to use the agency's regulatory analysts as options-identifiers.[56] Because of their training in economics, regulatory analysts should be capable of identifying market-oriented options that may be more efficient and that may result in some regulatory relief. Yet if they play a very marginal "speak-when-spoken-to" role in the decisionmaking process, they will have few opportunities to advance innovative options. This disadvantage should not be pressed too far, however, in light of the absence of strong evidence that regulatory analysts with greater institutional power contribute significantly to the options-identification process.[57] Moreover, upper level decisionmakers in programs with little discretion to adopt market-oriented regulatory alternatives may not feel that the options-identification role of the regulatory analyst is important enough to warrant making the regulatory analysis office a full-fledged participant in the decisionmaking process.

The outside advisor model may also reduce the extent to which the regulatory analysis office can play the role of "institutional skeptic." If the regulatory analyst's input is only available when requested by the program office or the upper level decisionmakers, then the analysts will probably not become sufficiently acquainted with the work of the program office to provide skeptical comment and review. The result may be that poorly thought out regulations find their way into the Federal Register.

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[56] See, Croke & Herlevsen, Environmental Cost-Benefit Analysis: The Illinois Experience in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods 17 (Swartzman, Liroff, Croke eds. 1982). ("[I]f the cost-benefit analysis program is carried out by an agency separate from those designing the regulation, the program does not truly aid in objective development.")

[57] See, pp. V - 14-17, supra.

C. The Team Model.

The team model is by far the most common decisionmaking model in the regulatory agencies studied in connection with this Report.[58] It is used in regulatory programs in all four of the Departments and agencies studied in Chapter 3, and it is probably the prevalent decisionmaking model in the entire federal government.[59]

Under the team model, the primary subordinate decisionmaking entity is a "team" or "work group" composed of representatives from all of the institutional entities within the agencies that have an interest in the outcome of the rulemaking process. Typically, a team is composed of representatives from the program office, the research and development office, the regulatory analysis office, the Office of General Counsel (or Solicitor), the enforcement office, and one of the agency's regional or field offices. The team meets periodically to discuss regulatory options, to discuss problem areas, to respond to requests of upper level decisionmakers, and to resolve disputes among team members. Although the program office usually has responsibility for the rulemaking effort, various aspects of the overall responsibility are generally delegated to members or subcommittees of the team. Copies of memoranda, rulemaking and regulatory analysis documents, and decisionmaking documents that individual team members draft are circulated to team members for review and comment. All members of the team are regarded as co-equal participants in the decisionmaking process, and there is usually strong pressure, deriving from both the group psychology of the effort and from upper level decisionmakers, for the team to reach consensus on important questions.

Mechanisms for resolving disputes on teams vary. Usually the members of the team strive to minimize disputes. Sometimes disputes are resolved by votes, with the minority acquiescing in the majority's decision.[60] Usually, dissenters are allowed to elevate disputes through formal or informal channels to higher levels for resolution.[61] A team member, however, can only elevate dissents a limited number of times without fracturing the consensus necessary for the effective operation of the team. In other agencies, the lead office resolves disputes, and the will of the lead office will prevail unless reversed at a later stage by a higher level decisionmaking entity.[62]

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[58] The team model is employed in the Food Safety and Inspection Service of USDA for many rules, in the Occupational Safety and Health Administration of USDA, in the Federal Aviation Administration of DOT, and in all of EPA.

[59] See. Meltsner, supra note 3, at 67.

In most agencies that employ the team model, the team approach is also employed at higher decisionmaking levels.[63] After the low level "work group" has completed its work, a "steering committee," composed of the superiors of the team members, will review the initial team's efforts. This second level team is often used as a quality control mechanism and as a vehicle for resolving disputes upon which the low level team could not reach consensus.

The team approach can ensure that all of the necessary analyses from the various offices are effectively integrated into the decisionmaking process. In addition, by providing a single place for dividing up research and analysis responsibilities, the team approach can avoid duplication of effort and thereby preserve scarce agency resources. Moreover, the team approach can identify and help avoid conflicts among regulatory programs within the same agency, and thereby avoid unnecessary inconsistencies.[64]

Perhaps the most important advantage of the team model is the vehicle that it provides for the interchange of professional perspectives. The program office, the regulatory analysis office and the research and development office can all make information and expertise available to the collective decisionmaking entity.[65] Team meetings can serve as a forum for airing differing views about the assumptions and inferences that the agency should make and draw in its regulatory analysis and rulemaking documents. In this way the interchange can provide a synthesis that goes beyond the outlook or observations of any individual group member.[66] Although agency policy is not necessarily a matter of professional perspective, the team approach provides an opportunity for team members to debate the most appropriate policy for the agency to follow in the rulemaking effort.

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[60] See, Chapter 3, at Notes 654-657 (OSHA).

[61] See, Chapter 3, at Notes 654-657 (OSHA).

[62] See, Chapter 3, at Notes 654-657 (OSHA).

[63] In one agency described in Chapter 3, the decisionmaking team for very important rules is composed of high level decisionmakers including the Administrator of the agency. See, Chapter 3 at Notes 116-133 (FSIS).

[64] See, Chapter 3, at Notes 937-940.

The team approach thus allows the agency regulatory analysts to play a full range of roles. The regulatory analysts, who will normally be assigned the task of drafting regulatory analysis documents, are able independently to gather and analyze data concerning the costs and benefits of regulatory options. Under most varieties of the team model, the regulatory analysts are involved in the decisionmaking process at the options-identification stage. They can therefore make innovative options available to the team for consideration. The team model does not, however, require the analysts to perform an options-identification role, and the experience of agencies that have employed the team model does not suggest that the regulatory analysts in those agencies are much more effective in identifying innovative regulatory options than they are under other models.[67]

The team model provides the regulatory analyst an opportunity to play the institutional skeptic and advocate roles. While the team model does not insist that the regulatory analysts criticize the work of other team members and their consultants, members of the team are expected to offer constructive criticism when copies of studies, memoranda, and rulemaking documents are circulated to them.[68] Similarly, while the team model does not insist that team members serve as advocates for particular perspectives, an agency office often develops a regulatory strategy or a point of view that it expects its representatives to take with them into working group meetings. It is therefore not uncommon for the representatives of a particular office to become advocates for a particular policy perspective. Regulatory analysts typically act as advocates for reduced regulatory burdens and for market-oriented solutions to regulatory problems.

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[65] See, Chapter 3, at Notes 930-933.

[66] See, Chapter 3, at Notes 934-935.

[67] See, Chapter 3, at Notes 721-725 (OSHA); at 547-549 (FAA); and at 937-940 (EPA).

[68] See, Chapter 3, at Notes 934-936.

The team model has the ability to cushion intra-agency debates within its consensus-building format. While spirited debates can break out among team members, the team approach nevertheless exerts pressure toward resolving differences through compromise. Every member of the team is responsible for producing a product within a specified time frame. If the team fails to achieve consensus and this failure delays the team's effort, the warring participants may be blamed.[69] Indeed, the first question that upper level decisionmakers in individual offices are likely to put to team representatives when teams fail to reach consensus is, "Did you try to work this out with the other offices?" A team member, or an office, that elevates too many disputes begins to lose its effectiveness in the agency's overall rulemaking efforts.

The team model does, however, have some important disadvantages. First, the model is very dependent upon high quality input from all of the relevant offices. Yet the team leader, who is typically an employee of the program office, has no authority to ensure that high quality personnel are assigned to his or her team. In addition, the team leader has few sanctions available for team members who do not attend meetings or fail to perform assigned duties in a timely fashion. For example, the team model can prove very wasteful of agency resources if the representative from the regulatory analysis office fails actively to participate in team meetings and withholds critical comments until the review stage at which the only option available to deal with the objection is a return to the drawing board.

Another great disadvantage of the team model is inherent in the consensus-building approach that it employs. The great pressure toward consensus can cushion the skepticism with which the representative from the regulatory analysis office reviews the products of the other offices. Similarly, the natural incentive to resist giving offense to other team members can reduce the vigor with which the representative from the regulatory analysis office presses for alternatives that that office finds attractive. The press of deadlines can impel representatives from all of the offices to soften their positions on important regulatory issues in order to get the rule out on time.[70]

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[69] In this sense, it is easier for a regulatory analyst to play an institutional skeptic role in the team model than it is for him or her to play an advocacy role. It is less blameworthy to object to the program offices efforts for failure to consider certain data or alternative explanations than it is to object on policy grounds.

The pressure toward consensus in the team model can have the effect of reducing the range of options that the staff provides to upper level decisionmakers. The team model can "reduce policy to its lowest common denominator."[71] Worse, team members are susceptible to a mind-numbing malady that Professor Janis has labeled "groupthink." According to Professor Janis, "members of any small cohesive group tend to maintain esprit de corps by unconsciously developing a number of shared illusions and related norms that interfere with critical thinking and reality testing."[72] For example, the team model in EPA often effectively lined up all of the relevant institutional actors behind a single recommendation to the Administrator, leaving him or her with only two realistic options -- to accept the staff recommendation or to return to square one.[73]

In addition to limiting the effective options available to the upper level decisionmakers, the forced consensus of the team approach can lull the decisionmakers into a false sense of security in the team's preferred option. The rulemaking and regulatory analysis documents that document the team's efforts may fail to display the options that the team rejected and recount the controversies that arose among team members over the advantages and disadvantages of those options. The net result may be that "[w]hen compromise positions reach a high-level executive in a form that suggests a unified, consensual judgment, they can give the ultimate decisionmaker a false sense of security; the policymaker receiving the watered-down proposals may lack an awareness of the potential problems buried within the recommendations."[74]

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[70] See, Edwards & Sharkansky, supra note 21, at 141.

[71] Meltsner, supra note 3, at 243.

[72] I. Janis, Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascoes 35-36 (1972). See also, Meltsner, supra note 3, at 281-82.

[73] See, Chapter 3, at Notes 901-904.

D. The Adversarial Model.

We have seen throughout Chapter 3 that any effective attempts to bring comprehensive analytical rationality to bear upon regulatory decisionmaking will necessarily breed institutional rivalry.[75] One institutional response to the inevitable clash between techno-bureaucratic rationality and comprehensive analytical rationality is to capture the institutional rivalry in an adverarial decisionmaking model. Under this adversarial model, each office is responsible for assembling its own information and analyses and for critiquing the information and analyses of the other office. Disagreements over assumptions and inferences and over the appropriate policies to follow in particular rulemaking efforts are aired in an adversarial fashion, either by memorandum or orally in meetings, before the ultimate agency decisionmakers who resolve disputes in favor of one or the other of the adversaries.

The only agency among those studied in connection with this report to implement the adversarial approach is the National Highway Traffic Safety Administration (NHTSA) in DOT.[76] That agency has structured the decisionmaking process to "reflect [its] commitment to a full hearing of all consequences of [its] regulations."[77] The Rulemaking Office in NHTSA, which is composed of scientists, engineers, and a few economists, prepares a lengthy Draft Rulemaking Support Paper, based upon the data and analysis that the Rulemaking Office and the Office of Research and Development have assembled. The

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[74] Edwards & Sharkansky, supra note 21, at 128.

[75] See, Silberman, supra note 20, at 39.

[76] See, Chapter 3, at Notes 300-380.

[77] Regulatory Reform Act, Hearings on H.R. 2327 Before The Subcomm. on Administrative Law and Governmental Relations of the House Committee on The Judiciary, 98th Cong., 1st Sess. 247-8 (1983) [hereinafter cited as Hall Hearings] (testimony of Mr. Frank Berndt Chief Counsel, NHTSA).

Draft Rulemaking Support Paper contains a brief analysis of the costs and benefits of the alternatives that the Rulemaking Office has identified.

The Rulemaking Office prepares the Draft Rulemaking Support Paper with minimal support and input from the Plans and Programs Office, which contains the agency's regulatory analysts. The Plans and Programs Office undertakes the regulatory analysis document drafting process as an entirely separate endeavor. It may rely upon the data and analysis in the Rulemaking Support Paper, but it usually goes far beyond that document in gathering information and exploring alternatives. When the regulatory analysis document is completed, the Rulemaking Office has an opportunity for review and comment.

Each office is expected to be very critical in its review of the other's data and analysis. Each brings its own perspective to the assumptions and inferences that are often necessary to fill gaps in the existing information. The regulatory analysis office believes that one of its functions is to restrain the natural tendency of the program office to issue rules without sufficient regard for their economic consequences. Finally, each office brings to the rulemaking process a view of the appropriate role for regulation in the economy that informs its approach to the agency effort.

The inevitable disputes that arise between the offices under the adversarial model in NHTSA can be resolved in several ways. Initially, the two offices attempt to resolve disputes informally by memorandum, telephone, or meeting. Failing this, the heads of the two offices send a joint memorandum to the Administrator outlining the dispute and asking for a resolution. On relatively rare occasions, the Administrator calls a meeting of the disputants to air their positions orally before him. Like other aspects of the decisionmaking process, these meetings are intended to be adversarial in nature with each side giving its views and attempting to rebut the arguments of the other.

The adversarial model has the capacity to bring comprehensive analytical rationality fully to bear upon agency decisions. The agency analyst independently studies the regulatory problem and prepares a regulatory analysis document that explores a wide range of options, tests each option against the available data, measures the options against pre-existing agency policy goals, and assesses the advantages and disadvantages of each option.

The fact that two separate offices intensely evaluate the existing data and analyses reduces the likelihood of purely technical mistakes.[78] The adversarial model also inhibits the natural tendency of bureaucrats to ignore or belittle information that undercuts their recommendations.[79] The staff of each office can rest assured that if it does not come forward with negative information, its counterpart will. By fostering the broadest possible exchange of information and analysis, the adversarial approach can go a long way toward exposing hidden agendas in both offices. This enhances the accountability of the offices to upper level decisionmakers and ultimately to the general public.[80] Because the underlying information and arguments that the agency adopts receive such a thorough adversarial airing, it is less likely that the agency will be surprised by the information and arguments of the outside commenters on the proposed rule.

The adversarial model also encourages agency analysts to play a policy communication role. Under that model the upper level decisionmakers can depend upon the regulatory analysts to make them aware of any variations from perceived agency policy in the analysis contained in the rulemaking documents. Likewise, they can expect the program office staff to point out deviations from its view of agency policy in the regulatory analysis documents. Indeed, given the general inability of empirical data to determine a regulatory result for most agencies engaged in social regulation, policy can be the primary focus of most internal debates.

The adversarial model maximizes the options available to the upper level decisionmaker.[81] The agency's regulatory

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[78] Telephone Interview with Mr. Larry Blincoe, Office of Program and Rulemaking Analysis, Office of Plans and Programs, National Highway Traffic Safety Administration, DOT, April 10, 1984.

[79] See, Edwards & Sharkansky, supra note 21, at 129.

[80] Segal Interview, supra note 2.

[81] See, Chapter 3, supra at pp. 126-127; Silberman, supra note 20, 15 39. ("A creative tension between policy analysts and line bureaucrats liberates the [political] appointee, not only to choose between different

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analysts are free in this dynamic decisionmaking process to bring many different perspectives to the upper level decisionmakers' attention. In this adversarial environment, it is not likely that innovative options will be rejected out of any perceived need to reach an overall staff consensus. Indeed, it is possible that the debate between the two offices will surface options or issues that neither office had identified prior to the debate.

The adversarial model thus avoids the team model's capacity for "groupthink," which tends to hide important issues from the ultimate decisionmaker. The regulatory analysis office is not likely to become "co-opted by the other offices in the agency" under the adversarial approach.[82] Each office must come forward with its best options, analyses, and arguments and it must be prepared to meet the criticisms of the other office.

Finally, the adversarial model demands that the regulatory analysis office play an adversarial role in the decisionmaking process, and it ensures that the regulatory analyst's market-oriented policy preferences will receive a full airing in the agency's internal debates. If they are effective advocates, the agency's regulatory analysts can become influential determinants of agency policy.

Agency policymakers are the beneficiaries of this full airing of the pros and cons of a wide range of regulatory options. Upper level decisionmakers in NHTSA, for example, believe that the "creative tension" between the program office and the regulatory analysis office is the best way to ensure that the staff-prepared memoranda are not "loaded" in favor of a particular option.[83] They believe that the adversarial process "not only produces the best possible data and analysis, but also provides the Administrator with the most independent

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81 approaches but to fashion his own.") Cf., Meltsner, supra note 3, at 226.

[82] See A. Meltsner, supra note 3, at 168.

[83] See, Chapter 3, at Notes 341-351.

and objective advice for arriving at the best possible rulemaking decisions."[84]

The adversarial model, however, has several distinct disadvantages. Perhaps the most obvious disadvantage is the duplication of effort that it entails. Each of the two offices performs many of the same data gathering, analysis, and review functions. While this duplication no doubt increases the accuracy of agency decisions and greatly decreases the possibility that the agency will have to return to the drawing board following public comment, it may be too resource-intensive for many agencies in a time of chronic resource shortages. Moreover, the tendency of the adversarial model to discourage early information-sharing among an agency's program and regulatory analysis offices can result in unnecessary waste of precious analytical and technical resources. It can be particularly wasteful for one office reviewing another office's fairly complete technical or economic assessment to produce information that should have been included in that assessment.

Because a large range of possible options exists for almost every regulatory decision, the program office must make an initial determination of which options deserve serious consideration. If the regulatory analysis office disagrees, and presses the disagreement, there is a real possibility that the rulemaking office may have to redraft its documents and perhaps even undertake further research. In addition to giving the program office the strong impression that it has been "ambushed," the process can prove very wasteful of agency resources. The program office may have to "scramble to catch up with some data on the new option."[85] Worse, since the program office may feel that it lacks time to study fully the new option, it may simply attempt to amend existing documents to include the new option, thereby increasing the likelihood of technical mistakes.[86] Similarly, the office that loses the ultimate battle over which option should be selected may have to amend its document to support the upper level decisionmaker's choice. This will create a natural pressure to "rework" the technical data to support a different option. While there is usually room within the uncertainties inherent in technical analysis to shift nuances without "fudging" the data, the probability of technical mistakes again increases. Ironically, a procedure designed to increase accuracy may have precisely the opposite effect.

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[84] Hall Hearings, supra note 77, at 248 (testimony of Mr. Frand Berndt).

[85] Telephone Interview with Ms. Ellen Kranidas, Acting Associate Administrator for Plans and Programs, National Highway Traffic Safety Administration, DOT, June 13, 1984.

The model is also very demanding of the time of upper level decisionmakers. While one of its great advantages is its capacity to broaden the options and considerations that upper level decisionmakers have available to them, it likewise demands more of their time and effort. The model's resistance to consensus building at low levels means that upper level decisionmakers must resolve many of the disputes that break out among the adversaries. Because there is no predetermined place in the decisionmaking process for selecting among regulatory options, disputes requiring upper level attention can erupt at almost any time. Upper level decisionmakers must therefore maintain a continuing familiarity with the complex issues in ongoing regulatory proceedings.

Both of the above resource-intensive aspects of the adversarial model suggest that, as a practical matter, the model will produce decisions more slowly than the other models.[87] It takes time to gather and analyze information and to review the work of other offices.[88] Dispute resolution can also be a time consuming effort. The process can be especially time consuming if one or another of the offices must make frequent trips back to the drawing board as it receives critical reviews from its adversary. In short, it takes a lot of time to use conflict creatively.[89] An agency that adopts the adversarial model may therefore have to allow more time for any given rulemaking effort.

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[86] Telephone Interview with Mr. Ralph Hitchcock, Director, Office of Vehicle Safety Standards, Office of Rulemaking, National Highway Traffic Safety Administration, DOT, June 5, 1984 [hereinafter cited as Hitchcock Interview].

[87] See, Chapter 3, at Notes 358-363.

[88] Hitchcock Interview, supra note 86 (suggesting that it can take months or even years to amend a technical support document to reflect a brand new option).

While the adversarial model will almost certainly generate "tension" between the program office and the regulatory analysis office, the tension need not necessarily be "creative." On occasion, it can be destructive, as the warring factions resort to bickering and personal attacks.[90] The widely differing perspectives of the technical and regulatory analysis staffs greatly enhances the potential for discord. Organizational subunits in large bureaucracies are already prone toward pettiness, "turf consciousness," and personality conflicts. The conscious addition of an adversarial decisionmaking approach can only divert additional energies into petty bickering, "one-upsmanship," and other nonproductive activities. All of the disputants may begin to lose sight of the agency's broader goals in their desire to win intra-agency battles and enhance their institutional status.

A corollary to this observation is the risk that the adversarial model poses to agency morale. If one of the offices is a more frequent loser of the intra-agency disputes, morale in that office will understandably suffer.[91] A related problem of a long range nature is the potential for dramatic shifts in regulatory policy as personnel at the top of the agency change. Upper level personnel changes can shift the fortunes of the adversarial offices. If, as is likely, previous battles have pushed both offices toward the extremes of their differing policy perspectives, the change can result in a more radical shift in policy than the new decisionmakers might have anticipated.

Finally, the output of the adversarial model may depend to too large an extent upon the advocacy abilities of the personnel of the various offices.[92] If one of the two offices is blessed with an able advocate for a leader, it may win more regulatory battles for this reason alone. Even better advocates from outside the agency, however, may well reveal the weaknesses in the reasoning or analysis of that office in the public comment process, and the agency may be required to rework its proposal. On the other hand, upper level decisionmakers, like good judges, should over time acquire the ability to discount this factor sufficiently to reach sound regulatory decisions, even if it means ruling against the better advocate.

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[89] Telephone Interview with Mr. Arthur Gass, Office of Risk Reduction Technology, Directorate of Health Standards Programs, Occupational Safety and Health Administration, DOL, July 23, 1984.

[90] See, Chapter 3, at Notes 348-351.

[91] See, Chapter 3, at Notes 352-357.

[92] Cf.. Edwards & Sharkansky, supra note 21, at 136.

V. Selecting the Right Model.

The foregoing description and analysis of the four prominent models for structuring regulatory analysis into the regulatory decisionmaking process suggests that no single model is best for all agencies and for all regulatory programs. Different agencies have different degrees of discretion. Different programs have different levels of complexity. Different agency heads have different management styles. And the likelihood of attracting high quality analytical personnel varies from agency to agency. Hence, rather than attempt to settle upon a single "best" approach to structuring regulatory analysis, the following discussion will focus upon the considerations that might guide a particular agency toward a particular decisionmaking structure.

A. A Comparison of the Models.

The hierarchical model is well suited for agencies that regulate according to statutes that articulate clear policy goals and provide very little agency discretion. Because it combines the cost and benefits assessment functions in a single individual or office, the hierarchical model is probably best adapted to agencies engaged primarily in "economic" regulation where costs and benefits analyses demand the same kind of expertise and can easily be reduced to the same units. The hierarchical model would not be as useful in agencies engaged primarily in social regulation, where gathering information on benefits might require an entirely different mix of training and skills that gathering information on costs.[93]

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[93] Perhaps for this reason, the Food Safety and Inspection Service in USDA, which is one of few agencies in that

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Since the hierarchical model lacks a designated institutional skeptic, it will function best in a standardized regulatory context in which there are few realistic options and little dispute over the validity of the available information on the costs and benefits of options. The hierarchical model is not well suited for regulatory programs that are highly controversial and for which virtually every important rule will be subjected to intense public scrutiny and executive and judicial review. For such controversial programs the agency must analyze all realistic options very carefully and subject that analysis to close scrutiny before putting the rule "on the streets" where it will inevitably be subject to intense attacked. A separate institutional skeptic can help anticipate outside criticism and thereby help prepare the agency to respond to outside attack.

Similarly, the hierarchical model may not work well in programs that must deal with large data gaps and highly uncertain predictive models. The agency in these contexts inevitably has a large degree of discretion to accept and reject data, to draw inferences, and to choose models based upon result-oriented policy determinations. In such wide open regulatory contexts, where costs and benefits are not easily reduced to a common coin, the decisionmaking process can usually profit from a healthy debate between the technical staff and the staff of a separate regulatory analysis office. These debates can reveal to upper level decisionmakers, and ultimately the public, the extent to which uncontroversial economic and technical information suggest a choice among regulatory options and the extent to which the agency's view of appropriate public policy must determine that choice.

The outside advisor model is better adapted to regulatory programs in which information and analysis on costs and benefits is helpful to the decisionmaker on occasion, but rarely outcome determinative. It is therefore well suited for wealth redistribution programs, and statutes that place economic feasibility concerns on a lower plane. The outside advisor model is not well adapted to new or controversial

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93 Department with large social regulation responsibilities, appears to be evolving away from the hierarchical model that characterizes most of the agencies in the Department whose regulatory responsibilities encompass largely economic regulation.

programs in which an analyst could be useful in identifying innovative options that could reduce conflict.

The analyst in the outside advisor model is not an advocate for a particular policy outlook; nor does he or she have much impact on the agency's substantive decisions. The outside advisor model is therefore probably most useful in programs where the particular market-oriented policy orientation of the regulatory analyst runs counter to statutory directives, because the model uses the information-analyzing talents of the regulatory analyst without allowing him or her to advocate policies that would in effect usurp legislative policy prescriptions. The outside advisor model best uses the talents of the regulatory analyst in programs where regulatory options are limited and in which upper level decisionmakers are likely to see the policy implications of regulatory options without extensive participation of an institutional skeptic.

The team model and the adversarial models are very similar in the extent to which they make use of the analyst's data gathering abilities. Both models are well suited for bringing comprehensive analytical rationality to bear upon complex regulatory programs in which many perspectives are relevant to the decisionmaking process. They are both useful in programs that require the agency to base its decisions upon a comprehensive assessment of all the relevant information on the costs and benefits of many regulatory options.

The adversarial model may, however, be slightly more effective in using the regulatory analyst in his or her information-provider role. Under the adversarial model, the analyst undertakes an independent review of the relevant literature and drafts a separate document. The analyst's efforts may include the information that the technical staff relied upon, but can go well beyond that information. The regulatory analyst in the team model is expected to make any information in his or her possession available to the rest of the team members for use in drafting rulemaking documents, but the analyst may be inclined to rely upon the program office for most information, and to play a review role. It is likely that a fully independent data gathering effort by the regulatory analyst under the adversarial approach will turn up more useful information than the team effort, although this difference should not be pressed too far.

Both the team and the adversarial models allow the regulatory analyst to play an options-identification role. The adversarial model, however, is structured to guarantee friction when the analyst identifies options. Because of resource constraints and the structure of the model, the analysts are not likely to suggest innovative options until rather late in the process after the program office has expended considerable effort in identifying, narrowing, and analyzing options. If the analyst's options vary significantly from those of the of the program office, that office is likely to be very resistant to slowing down the process and re-analyzing the new options. The result is either a slow process or a process that does not effectively use the options-identification role of the regulatory analysis office.

The team model, by contrast, allows the regulatory analyst to suggest options early in the evolution of a rule, before the program office has settled upon and studied a particular set of options. Since the analyst can approach the options-identification task as a helper, rather than as an adversary, the other members of the team are likely to be more receptive to the analyst's suggestions. There is less chance that the analyst will be forced to elevate a dispute over an option to higher levels in the decisionmaking process.

On the other hand, the team model may reduce the range of options available to the upper level decisionmakers. We have seen that the consensus-building process that is inevitably part of the team approach may operate to exclude controversial options before upper level decisionmakers have had an opportunity to explore them. The adversarial model not only allows the upper level decisionmakers to consider a broad range of options, but it often insists that they do so in order to resolve disputes between the two offices. Because of its consensus-building tendencies, the team model may not be well suited for strong agency executives who desire to have a significant degree of input into the actual process of defining and rejecting regulatory options. It is better suited to a busy manager who is inclined to trust his or her technical staff.

Both the team and adversarial models can more effectively use the regulatory analyst as an institutional skeptic than the outside advisor model. Under neither model is the regulatory analyst likely to be employed merely as a justifier. The adversarial model may give the analyst a greater incentive to be critical of the work of the technical staff in the program office, because of the natural competition that will develop between the program office and the regulatory analysis office. But this advantage may come only at a significant loss of institutional harmony and some risk of technical error. The "creative tension" may dissolve into destructive backbiting.

Both models are also effective vehicles for the regulatory analyst's advocacy role. Under the team model the regulatory analyst has an opportunity to advocate efficient approaches during the team meetings and in memoranda to upper level decisionmakers as a rule proceeds up the hierarchy to higher level teams. Similarly, the adversarial model allows the regulatory analyst to argue for efficient options in debates with the program office. Both models will be useful in programs in which the ultimate decisionmakers have fairly broad latitude to make decisions based upon a rough balance between the costs and benefits of regulatory protections. Because of the team model's tendency toward compromise at low bureaucratic levels, however, the adversarial model may result in the clearest articulation of the efficiency considerations involved in a rulemaking effort. It will almost certainly highlight the differing policy perspectives of the two offices better than the team model.

The adversarial model may therefore be better suited to an agency that faces complicated regulatory problems about which the clash of competing perspectives could be illuminating to upper level decisionmakers. Because it is so resource-intensive, however, an agency adopting the adversarial model should be prepared to devote significant resources to the process. The team model may be better suited to an agency that has to reach many important decisions under relatively tight time constraints.

The adversarial approach also presumes that upper level decisionmakers want to be closely involved in important day-to-day decisionmaking and are willing to devote a relatively intense level of continuous attention to important rulemaking efforts. Under the adversarial model, the upper level decisionmakers must be willing to keep "up to speed" with important rulemaking efforts. All of this suggests that the adversarial model may be most appropriate for relatively small agencies that deal with only a few very important and very complicated rulemaking initiatives in a given year. For large agencies whose busy leaders lack the time or inclination to follow carefully the development of rules in subordinate decisionmaking units, the team model may be the better approach.

Finally, both the team and adversarial models can allow the regulatory analysts to become influential determinants of agency policy. The team model allows the representative from the regulatory analysis office to participate in the deliberations of the subordinate decisionmaking entities. The regulatory analysts are not limited to presenting economic data and analysis. They can advocate that the agency adopt a particular option, and this advocacy can extent to presentations before high level working groups and before the ultimate decisionmaker. Likewise, the regulatory analysts under the adversarial model can advocate particular policies in the internal agency debates that typically that model.

The team model, however, may give the regulatory analysts more influence upon agency decisions in the long term. The pressure toward compromise and consensus that the team model exerts upon team members ensures that the recommendations of the teams will in the long run reflect the policy preferences of the agency's regulatory analysts. By contrast, the regulatory analysts may acquire only erratic influence under the adversarial model. When upper level decisionmakers share the perspective of the analysts, the analysts are likely to prevail more often in the agency debates. When the upper level decisionmakers come to the process with a less market-oriented point of view, the fortunes of the regulatory analysts will fall.

B. An Intermediate Approach.

While the choices between the hierarchical model and the remaining models and between the outside consultant model and the remaining models seems relatively clear cut, the choice between the team model and the adversarial model is not an easy one. Both of those models allow the regulatory analyst to play all of the potential roles that we have identified earlier in this chapter. Each model has important advantages and significant disadvantages.

The Environmental Protection Agency has recently adopted an intermediate decisionmaking structure that incorporates many of the advantages of both models and reduces many of the disadvantages. Under this process, high level personnel in the program and regulatory analysis offices may nominate major or significant rules for a special "Options Selection/Rejection Process." The Deputy Administrator of the agency then designates 20-30 rules per year for this special review process. These rules are reviewed on a quarterly basis by the Deputy Administrator and other upper level decisionmakers.

The lower level decisionmaking process adheres to the team model, with the exception that at crucial junctures in the evolution of a rule, an Options Review Meeting is held to choose which regulatory options the agency will actively pursue throughout the remainder of the rulemaking process. The participants in the Options Review Meetings are the Deputy Administrator and other very high level agency employees representing offices with an interest in the proceeding. The timing of the Options Review Meeting is flexible. It is intended to occur after the team has devoted some study to the relevant issues but before it has narrowed down the options to the two or three to which it will devote the bulk of its attention. The lead office is expected to prepare an analysis of several options for the First Options Review Meeting, the purpose of which is to narrow the options suggested by the team down to three or four options that the team should consider seriously prior to publishing the Notice of Proposed Rulemaking. A second Options Review Meeting can occur prior to the preparation of the Notice of Final Rulemaking.[94]

The options review model carries most of the advantages of the team model. It brings all relevant perspectives to bear upon the information gathering and analysis effort, and it allows the regulatory analyst to play the role of institutional skeptic. It reinforces the team model's incentives for the regulatory analysts to act as options-identifiers by focusing heavily upon options early in the evolution of a rule. There is some evidence that the analysts in the lead offices and the lead analysts in the centralized regulatory analysis office concentrate more upon identifying options for the Options Review Meetings than they otherwise might, because their efforts receive the careful attention of very high agency decisionmakers.

Similarly, the high status of the Options Review Meetings encourages the analysts to hone their adversarial skills.

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94 The decisionmaking process at FAA also resembles this intermediate model. While most day-to-day decisions are made by rulemaking teams, a high level Regulatory Review Board (also known as the "Murder Board") made up of personnel frokm headquarters and the relevant regions, meets approximately twice a year to go through new and existing rulemaking projects. See, Chapter 3, at Notes 289-293. It does not appear, however, that the Murder Board plays a very active role in selecting among options. It appears to play more of a role of keeping track of the rules within the agency. It does, however, have the power to eliminate projects from the list of proposed and pending projects. See, Chapter 3, at Notes 289-293.

Although there is no rule that the agency analysts must take an adversarial approach toward the Options Review Meetings, the intermediate model provides a unique opportunity for the agency analysts to press their policy perspectives before the ultimate agency decisionmakers early in the rulemaking process. While some Options Review Meetings are no more than "love ins," the regulatory analysts take a position different from that of the program office on an issue of importance in approximately fifty percent of the meetings. It is not unusual for the differences to be strong enough to warrant the preparation of a separate memorandum by the regulatory analysis office detailing its positions. The analysts then advocate their separate positions in the Options Review Meetings. Thus the intermediate options review model acquires some of the competitive flavor of the adversarial model.

The primary advantage of the options review model over the team model is the opportunity that it provides for upper level decisionmakers to intervene directly into the decisionmaking process at critical junctures. The process encourages members of the team to explore the broadest range of realistic options, and it allows upper level policymakers to narrow the range of options before they are eliminated by the compromise and consensus-building that goes on in team meetings. It should, in addition, discourage the "groupthink" phenomenon that often plagues consensual decisionmaking bodies.

The intermediate model also provides an ideal opportunity for upper level decisionmakers to communicate policy preferences and informational needs to subordinate decisionmaking units early in the development of a regulatory approach. It thereby reduces the likelihood that the team's final efforts will be remanded for further consideration of additional options or for the application of different policies late in a rule's development. The regulatory analyst still plays his or her policy communication role under the intermediate model, but he or she plays that role earlier and more often.

The options review model also has advantages over the adversarial model. Under this model the technical staff and the regulatory analysis staff are still partners on the rulemaking teams. While they may have different views of the data, analyses, and regulatory policy, they must still live with one another on a daily basis. All-out battles are reserved for the most important issues that divide the two offices. The high level Options Review Meetings provide a forum for raising the big questions, after which the representatives from the two offices can return to the team meetings to work out acceptable compromises on the less important issues. The conflicts are resolved early in the process, and the decisionmaking process is not constantly disrupted by petty bickering and backbiting.[95]

The intermediate model also requires less direct attention from busy upper level decisionmakers. They are only called upon to resolve important disputes over big issues at particular junctures in the decisionmaking process. They must "get up to speed" only for the relatively infrequent Options Review Meetings, and they are not "on call" to resolve every debate that may impel one of the adversaries to elevate matters. While the options review model definitely depends upon high quality upper level management for its effectiveness, it can be an effective vehicle for bringing a degree of adversarialness to the decisionmaking process in subordinate decisionmaking units without demanding intensive upper level scrutiny.

VI. Conclusion.

The primary message of this chapter is that agency managers must pay attention to agency structure if agency analysts are to function effectively in their assigned roles. Because the internal decisionmaking structure will vary, perhaps considerably, depending upon the roles that upper level decisionmakers want their regulatory analysts to play, there is no particular structure that is best for all agencies at all times. The foregoing discussion has attempted to identify some considerations that should guide institution builders in structuring regulatory analysis into the decisionmaking process. The ultimate choice belongs to the agency managers.

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[95] Personal Interview with Mr. Robert Wolcott, Special Assistant to the Deputy Administrator, EPA, June 27, 1984.

BACKGROUND REPORT FOR RECOMMENDATION 85-3

PRIVATIZING REGULATORY ENFORCEMENT: A PRELIMINARY ASSESSMENT OF CITIZEN SUITS UNDER FEDERAL ENVIRONMENTAL LAWS+

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I. INTRODUCTION: THE RISE OF PRIVATE ENFORCEMENT

In the early 1980s, a new phenomenon emerged in federal regulatory practice: private environmental organizations mounted a large-scale litigation campaign to seize the initiative for enforcing several major regulatory statutes against polluters. The statutes that enabled them to step into the shoes of government enforcement staffs, commonly described as "citizen suit" provisions, had been written into most of the major environmental laws during the 1970s, but they remained relatively dormant until they were rediscovered by the private enforcers. By 1985, more than 350 of these private enforcement actions had been initiated,[1] and the leaders of the plaintiff organizations were devising plans to extend their activities to other violators, other parts of the country, and other statutes. Some of them believed, or hoped, that this first wave of litigation would point the way to a permanent realignment of regulatory law enforcement in the environmental field--and perhaps elsewhere as well. This study is a preliminary attempt to assess some of the potential effects of this privatization of regulatory enforcement, and to speculate on what such a realignment might portend for the regulatory process.

Few legal phenomena are totally new, and the "citizen suit" has a variety of contemporary and historical antecedents. Statutes giving private parties the right to seek judicial sanctions for violations of health and safety standards have been used for at least 600 years in Anglo-American law,[2] and at times private actions have provided virtually the only form of regulatory enforcement.[3] Modern regulatory statutes also try to harness private litigiousness in pursuit of the public good, through devices such as the treble damage action,[4] the express of implied right of private action,[5] and the provision of attorneys' fees for successful litigants in judicial review actions.[6] What distinguishes the current citizen environmental suit, however, is the way in which it is being used, and the timing of its emergence as a significant force in the regulatory system.

Other forms of private action under regulatory statutes, such as antitrust treble damages or tort suits based on regulatory standards, are a relatively minor extension of the traditional damage action between private disputants. Incentives to sue may be altered or prospects for recovery enhanced as a result of the regulatory program, but the basis for judicial action is still a single dispute among particular parties. Typically, the emphasis is on making damaged parties whole; any resulting change of incentives for future action is generally a byproduct of this primary quest for corrective justice between plaintiff and defendant. The citizen suit, by contrast, inverts these priorities. Deterrence and determining the effective content of enforcement policy are the primary purposes of the current citizen suits; in many instances, there is not even an attempt to define and remedy private wrongs.

In this respect, citizen suits resemble familiar forms of judicial review of administrative action. Especially in the situation where the private litigant has an ongoing relationship with a regulatory agency, as many trade associations and national conservation organizations do in the environmental field, judicial review can be viewed as part of a continuing dialog between the agency and its constituencies over the content of regulatory policy. Judicial review, by defining the substantive and procedural boundaries on the agency's discretion, can determine whose vision of public policy will prevail in a particular field of regulation. But in the traditional judicial review action, the private litigants do not hope or expect to take over administration of the regulatory program.

In the citizen suit, by contrast, some of the private litigants hope to "step into the shoes of government" in a rather literal sense. As they see it, government agencies are typically unable or unwilling to enforce regulatory laws as they should be enforced. Private parties, armed with the legal weapons of the citizen suit, are fully capable of taking over routine enforcement cases, and they are free of the bureaucratic and political constraints that hobble government enforcers. Thus, the citizen suit should not be viewed as an occasional prod to goad reluctant agencies into action, or an extraordinary remedy for unusual administrative failures. Rather, it provides the opportunity for a major, perhaps permanent realignment of roles and powers in important areas of regulation: the creation of "private attorneys general" with responsibilities comparable to those of the public attorney general.

In an era when disenchantment with the effectiveness of government agencies is widespread, it is not surprising that proposals to "deregulate enforcement" would be taken seriously.[7] The conventional wisdom casts doubt on both the quantity and quality of regulatory action. Regulatory agencies rarely seem able to act quickly and comprehensively enough to resolve the social problems committed to them. Hobbled by inadequate staff and information, agencies may be trapped in a continually unsuccessful attempt to catch up with changing circumstances. When they do act, agencies may appear to be neither neutral nor expert; too often they seem to be "captured" by constituent groups, or preoccupied with trivia, or perpetually ensnarled in procedural red tape. As the perception spreads that the quality of agency decisionmaking is unacceptable, it is natural to consider whether decisionmaking power should be shifted from the public to the private sector. True deregulation, the outright abolition of regulatory programs and agencies, is the most familiar form of privatization, but in some areas such as environmental protection, full deregulation seems politically unacceptable. In such a setting, partial deregulation of particular functions may emerge as a promising compromise solution.

The attractiveness of privatizing regulatory functions is enhanced in fields like environmental regulation where the quantitative gap between resources and mandates is large, and probably growing. During the "environmental decade" of the 1970s, legislatures were more adept at giving new responsibilities to overburdened agencies than at finding the resources to let the administrators discharge those responsibilities effectively. The resulting gap between promise and performance was an obvious source of tension, even when agency budgets were growing steadily. The federal budget deficits of the 1980s have made it clear that the gap between promise and performance is not a temporary phenomenon; instead, the prospect for the environmental agencies in the foreseeable future is shrinking resources budgets and declining regulatory capacity. If the agencies will remain unable to carry out all of the functions given to them, then it becomes important for supportive constituencies to find structural alternatives that will accomplish the statutory objectives without dependence on agency resources. The citizen suit, which can be self-supporting through fee recoveries from violators, thus emerges as a partial solution to the resource gap.

While the citizen suit has these theoretical attractions, it nonetheless will have to surmount some formidable obstacles if it is to become an accepted and effective part of regulatory enforcement. This study, which looks primarily at the first wave of suits brought by environmental organizations under the federal Clean Air and Clean Water Acts, has identified four problems which can undermine the citizen suit as a device for regulatory enforcement. At this early stage in the evolution of private enforcement, it is not clear whether these problems will be solved; however, as we suggest later in this Article, there is some reason to believe that they can be, if the legal and political systems respond appropriately.

At the threshold, citizen suits must surmount a series of doctrinal barriers which could make it difficult or impossible to mount an effective private enforcement campaign. These issues of statutory interpretation and judicial lawmaking are the familiar ones that arise whenever a novel regulatory enactment becomes the subject of frequent litigation: the precise meaning of vague and untested statutory terms must be worked out, and the citizen suit must be fitted into a complex framework of existing private remedies and judicial review provisions. There has been a substantial volume of litigation under the citizen suit provisions during the fifteen years they have been in existence, first as a supplement to the traditional judicial review proceeding to force administrators to take or refrain from particular actions, and then more recently to impose penalties on violators. With few exceptions, this transitional litigation has reinforced the power of the citizen suit. Courts have generally been able to control inventive litigants' attempts to use citizen suits for purposes not intended by Congress, and they have upheld the private enforcers' arguments that citizen suits should be easy to bring and prove. Issues remain to be resolved, particularly in the area of remedies, but on the whole a reasonably consistent and workable body of law has developed to govern the bringing of private enforcement actions.

A second problem area, which is partly a matter of legal doctrine and partly managerial, concerns the coordination of public and private enforcement. With both public and private enforcers active in a regulatory field, there is a very real possibility that they will begin working at cross purposes. If regulated parties who are similarly situated receive different treatment depending on whether public or private enforcers win the race to the courthouse, then the fairness of the regulatory program is open to question. Moreover, if public and private enforcers follow radically different priorities or interpretations of law, this may create confusion in the regulated community or encourage undesirable behavior, such as collusive suits or acceptance of inadequate settlements. These coordination problems could undermine the rationality and acceptability of the regulatory program if carried to extremes, but most of them seem relatively easy to solve. The Administrative Conference of the United States has recommended several measures to achieve better coordination of environmental enforcement,[8] and additional coordinating devices may be developed as agencies and courts may be familiar with dual systems of enforcement.

A third basic problem is whether the citizen suit provisions are creating the proper incentives for the regulators, the regulated, and the groups bringing enforcement actions. These incentive issues are somewhat different for each of the three primary actors involved in the enforcement process. For the groups bringing the private enforcement actions, there are significant financial incentives, in the form of attorneys' fees and costs if they are successful in litigation, and sometimes "environmental funds" which can be extracted from violators in lieu of penalty payments through a negotiated settlement. In addition, there may be principled incentives arising from the plaintiff groups' commitment to environmental values, and organizational incentives when groups bring suits for the purpose of attracting or retaining members. The basic problem with plaintiff incentives is whether private enforcement will evolve in fact and in perception as an ethical enterprise motivated by a widely shared vision of the public good, or will instead be dominated by bounty hunters who will discredit the idea of citizen suits. Thus far, principled motivations are predominant, but it is possible that plaintiff incentives will shift if the courts continue to remove barriers to citizen suits and fee recovery becomes easier and quicker.

Among the regulated, the incentive issues center around the question of how well, and in what circumstances, deterrence works. The assumption of many of the plaintiff organizations is that enhanced deterrence is both necessary and sufficient. That is, many of the citizen suit plaintiffs believe environmental enforcement has become so lax that most of its deterrence value has been lost; voluntary compliance with environmental standards seems to be on the verge of collapse. However, if the plaintiff organizations continue to prevail in citizen suits, and substantial penalty awards become common, the situation can be turned around and strict compliance will become the norm.

This may be a plausible projection of industry response to incentives created by the citizen suit, but it is definitely not the only possible reaction. Punitive measures that are regarded as unreasonable can provoke massive resistance, not only in the courtroom but also in the political arena and in everyday life. Prohibition and the civil rights struggle offer examples of the difficulties that the legal system can have in trying to force significant behavioral change on a resistant portion of the populace. Antipollution enforcement may not have the broad, immediate impact on the citizenry that laws governing racial discrimination or consumption of alcohol did; but it seems clear that environmental regulation affects major sectors of American industry, and that private enforcement has provoked considerable resentment among target firms. Moreover, environmental enforcers, in common with most other regulators, operate in a relationship of mutual dependence with the regulated industry, at least to the extent that industry controls some of the data needed to make the regulatory program function effectively. In these circumstances, the possibility of significant backlash and protracted conflict should not be ruled out.

Private enforcement also may affect the incentives of the regulators who are caught between the private enforcers and their industry targets. In principle, and to some extent in practice as well, agency responses to citizen enforcement may vary considerably. At the extremes, affected agencies may welcome citizen enforcers as a supplement to their own resources, or resist them in the belief that they are introducing bureaucratic turf and interfering with established policies. Agencies may exercise their remaining discretion in a variety of ways to help or hinder the bringing of citizen suits. Regardless of how they react to private enforcement, agencies are likely to find that their relationships with the regulated industry and other constituencies are significantly altered. What those changed relationships will be, however, and whether they should be regarded as a cost or a benefit of private enforcement, is not yet clear. As the citizen enforcement action emerges from its current transitional stage and becomes a more familiar feature of the regulatory environment, the patterns of changed relationships should become clearer. For the present, however, the effects of citizen suits on relationships and incentives remain largely speculative.

Even if it were possible to trace out the changes in incentive structures resulting from the rise of private enforcement, there would still remain a question as to whether citizen suits are a good thing. The remaining question concerns the fundamental legitimacy of private regulatory enforcement, and this may be the most difficult and significant issue in determining the future of citizen suits.

As used here,[9] the legitimacy of citizen suits is a function not only of their pragmatic effectiveness, but also of their relationship to established visions of public order, which conflict sharply over the appropriate boundaries between public and private fields of action. When assessing the practical effects of citizen suits, even observers who are working from a common data base and a common set of inferences about the effects of citizen suits on compliance may differ sharply with respect to the desirability of the reported outcomes. These differences concern both the substantive efficacy of the regulatory program, and the means by which it is implemented.

In the environmental area there seems to be little consensus among constituency groups and commentators on the value of the underlying regulatory programs. Without such an underlying consensus, it is not possible to develop a generally accepted set of measures to assess the desirability of different levels of enforcement: those who believe that the relevant laws and rules are wrongheaded or ineffective will think that any additional enforcement is likely to make matters worse, while those who have faith in the purposes and methods of the laws will tend to favor any and all additional enforcement. In the short run, at least, these kinds of beliefs do not seem very responsive to empirical data. Instead, they may function as ideologies of regulatory enforcement, and the question of which ideology will gain dominance seems very much open.

In addition to the conflicting ideologies that color attitudes toward the pragmatic effectiveness of private enforcement, there is an equally strong division in beliefs about the appropriate dividing lines between private and public spheres of conduct. From the regulated industry side, private enforcement of regulatory laws seems an anomalous if not dangerous deviation from established divisions of responsibility and power. Private delegations of enforcement power may be as suspect as private delegations of rulemaking authority, because they bypass the existing structure of limited authority and political accountability that confines the powers of the regulatory state. In this vision of public regulation, administrative agencies should have defined spheres of authority, carefully detailed mandates from the political branches, and multiple structures of accountability and oversight to assure that their powers are exercised in accord with the dictates of elected officials. When regulatory powers break these confining bounds--especially when they are turned over to private parties--they may lose their legitimacy, for it is only by acting in accordance with accepted norms of accountability and control that regulation can become legitimate.

Plaintiff organizations and their lawyers typically come from a different tradition which holds as its preeminent value that government enforcement of social regulation should be responsive to the needs and desires of those the regulatory program is supposed to protect. To the extent that regulation serves "the people" rather than "the industry" or "the bureaucrats," it gains legitimacy; and, conversely, it forfeits that legitimacy when it becomes captive to the will of the powerful interests. From this perspective, private enforcement may be viewed as the ultimate legitimating device, since it gives the effective power to initiate regulation back to the people themselves.

Neither of these views, which are presented here in admittedly oversimplified form, is wholly satisfactory, and neither has been totally dominant during most periods in our history. The general picture that seems to emerge from the historical materials is that the appropriate boundary between public and private activity is shifting and contingent. The power of private parties to invoke regulatory sanctions has been highly variable overtime, waxing and waning periodically as different social problems arose and found solutions.

As the following sections indicate, citizen suit provisions were first enacted at a time when "capture" theories dominated scholarly and popular thought about regulation.[10] Agencies were regarded as unduly sympathetic to the interests of the regulated industries for a variety of reasons,[11] including the belief that there was often a serious imbalance of the interests represented in agency decisionmaking. Regulated industries dominated the regulatory process because they had the resources and incentives to hire the lawyers, experts, and lobbyists that would make their voices heard. Other interests, lacking these resources, remained mute and therefore typically lost out in the adversary struggles that constitute the regulatory process. The general answer to this imbalance of representation was creation of greater rights and opportunities for public participation in administrative decisions, backed by funding devices that would close the resource gap between industry and public interest groups.[12] The citizen suit, which gives the public a right to be heard in enforcement decisions and provides for expense reimbursement, is a logical outgrowth of the public participation movement.

Today, capture theories of regulation retain a strong following, but they no longer dominate the field. A variety of economic and behavioral analyses of regulatory enforcement have emerged to challenge the assumptions in which the citizen suit was originally created. These alternative views of regulation provide different ways of asking the question, what are the strengths and weaknesses of the citizen suit? And, as might be expected, they imply somewhat different answers.

II. OVERVIEW OF CITIZEN SUIT PROVISIONS

The two citizen suit provisions most frequently used today were both enacted during the environmental awakening of the early 1970s, in response to a history of perceived failures in government enforcement. The first private enforcement provision, section 304 of the Clean Air Act of 1970, was passed a few months after the first Earth Day was organized and the Nader Report Vanishing Air was published.[13] Nader's introduction to that report reflects the militant atmosphere in which the private enforcement suit was born:

> Air pollution (and its fallout on soil and water) is a form of domestic chemical and biological warfare. ... This damage, perpetuated increasingly in direct violation of local, state, and federal law, shatters people's health and safety but still escapes inclusion in the crime statistics. ...In testament to the power of corporations and their retained attorneys, enforcement scarcely exists. Violators are openly flouting the laws, and an Administration allegedly dedicated to law and order sits on its duties.[14]

Rhetoric aside, there was a widespread belief at this time that neither the federal government nor the states had done an effective job of enforcing antipollution laws. The Senate Report on the Clean Air Act of 1970 euphemistically described prior federal enforcement efforts as "restrained," and expressed the hope that citizen suits would "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[15] Two years later, the Senate Report on the Federal Water Pollution Control Act Amendments[16] was more explicit, noting that "[t]he record shows an almost total lack of enforcement." Despite repeated amendments to the original 1948 federal water pollution statute,[17] the law required multiple conferences and hearings before any coercive action could be taken. This process was so slow and cumbersome, the Senate report noted, that "only one case has reached the courts in more than two decades."[18]

Thus, the legislative histories of the Clean Air and Clean Water Acts reflect considerable skepticism, if not despair, over the prospect of effective government enforcement. Nevertheless, the legislative histories also indicate some congressional caution about giving private parties the power to enforce regulatory statutes. Proposals for broader forms of citizen suit legislation were under consideration in the early 1970s, and in many respects the private enforcement provisions of the Clean Air and Clean Water Acts can be considered a less radical alternative.[19] Several types of constraints are mentioned in the legislative reports, and incorporated in the legislation establishing these private enforcement actions. Private parties may sue only to enforce precise limits established by the responsible agencies rather than asking the courts to create standards under common law principles or broad statutory delegations.[20] Suits against the EPA administrator are allowed only when s/he has failed to perform a nondiscretionary duty.[21] Even when a private enforcement action meets these requirements, the party bringing it must give the agency 60 days' prior notice before filing the complaint, and the agency may elect to take control of the controversy and bar the citizen suit by bringing its own action.[22] Finally, Congress rejected the possibility of class actions to recover damages for pollution incidents, and included language in the legislative history reflecting that intent.[23]

The resulting provisions have a few significant differences, but the major features are substantially the same. Since virtually all clauses of these principal citizen suit provisions have been the subject of litigation, they should be briefly described at this point.

A. Parties. The Clean Air Act citizen suit provision, like most of the other private enforcement sections,[24] authorizes "any person" to bring a suit against "any person"--including the United States and other government instrumentalities to the extent allowed by the Eleventh Amendment--alleged to be violating an emission standard, limit, or order.[25] The Clean Water Act is somewhat more detailed; its citizen suit provision, section 505, defines the citizen eligible to bring suit as "a person or persons having an interest which is or may be adversely affected."[26] Its legislative history makes clear that the Water Act's drafters were incorporating the liberal test for standing articulated by the Supreme Court in its then-recent Sierra Club v. Morton decision;[27] but as noted below, this greater precision has not prevented a considerable amount of litigation over plaintiffs' standing.

B. Types of Action. On their faces, the Clean Air and Clean Water Act citizen suit sections authorize two types of court actions: a suit for penalty or injunction against an entity violating some kind of antipollution requirement (described here as a "private enforcement action"), and an action against EPA for failure to perform some nondiscretionary duty (hereafter referred to as an "action-forcing suit").[28] However, the statutes do not explicitly preclude other kinds of actions which might be brought; on the contrary, they contain a savings clause stating the legislative intent to preserve other common law and statutory rights to enforce emissions limits or seek other forms of relief against either polluters or agencies.

Thus, there is some potential for overlap and confusion among different forms of action to abate pollution.

C. Jurisdiction. The citizen suit sections uniformly provide that both action-forcing and private enforcement actions are to be brought in the federal district courts. However, major environmental laws like the Clean Air and Clean Water Acts also provide for limited statutory review of major agency decisions in the courts of appeals, sometimes under strict time constraints. The possibility of nonstatutory review in the federal courts, as well as various lawsuits against polluters or agencies in the state courts, further complicates the jurisdictional picture. Thus, in many environmental disputes there may be honest confusion as to whether the citizen suit is the appropriate avenue for invoking federal jurisdiction. In addition, the difficulty of defining non-discretionary duties creates some opportunities for forum-shopping or similar strategic behavior.

D. Notice. As previously indicated, the citizen suit provisions generally require that a private enforcer give 60 days' notice before bringing an action in court. This grace period is designed to give EPA a chance to assess and respond to the allegations. If it concludes that the proposed action is meritorious, EPA may itself bring a suit against the polluter, and thereby bar the citizen action.[29] If the suit is a private enforcement action, notice generally must be given to the EPA, the responsible state agency, and the alleged violator. When the suit seeks to force the Administrator to perform some action, notice need only be given to EPA.[30] While the statutes are quite explicit in defining these requirements, they do not address the consequences of a failure to give the proper notice. Depending upon how one reads the statutes, notice problems can be regarded as jurisdictional defects mandating dismissal of the action, or pleading technicalities which can be waived or excused.

E. Diligent Prosecution Exemption. The Clean Air and Water Acts, like most citizen suit provisions, bar private enforcement or action-forcing suits when the responsible government agency is "diligently prosecuting a civil action [relating to the alleged violation] in a court of the United States or a state." These clauses were evidently inserted to assure that citizen plaintiffs would serve as a supplement to rather than a substitute for government enforcers, but the drafting of the sections poses at least two problems of interpretation. The most apparent is the definition of "diligence"; since there are few legal time requirements on the management of an enforcement case, and potentially vast differences of opinion between the agencies and environmental plaintiffs about appropriate enforcement strategy, how can a court tell whether prosecution of a given case is sufficiently "diligent"? Moreover, in many instances of apparent violation, EPA or the responsible state agency will have the option of trying to secure compliance through a variety of methods short of court litigation, ranging from telephone calls to formal administrative hearings for the imposition of civil penalties. May some or all of these administrative actions be considered the equivalent of a "court action" for purposes of the diligent prosecution exemption?

F. Intervention. The citizen suit provisions of the Clean Water and Clean Air Acts provide for two kinds of intervention. When the citizen suit is barred by the agency's "diligent prosecution" of the violator, the putative citizen plaintiff may intervene as of right. Conversely, the Administrator may intervene in citizen suits if not already joined as a party.

G. Remedies. The two major citizen enforcement provisions differ substantially in the remedies available to the private plaintiff. Section 304 of the Clean Air Act sets the pattern for the great majority of citizen suit provisions by authorizing only injunctive relief. It directs the court to enforce emissions standards, limits, or orders, or to order the Administrator to perform mandatory duties. The Clean Water Act's citizen suit section has a similar remedial provision, but it also stipulates that the court has power "to apply any appropriate civil penalties" available under the Act.[31] Thus, a private enforcer can seek civil penalties ranging up to $10,000 per day for each water pollution violation. Moreover, the Water Act differs from many environmental statutes in failing to give EPA the power to impose civil penalties itself. If a discharger refuses to comply with legal requirements, the agency can either issue an administrative order--which carries no automatic penalties if the violator simply ignores it--or go to court and seek the statutory penalties. As a practical matter, this makes it more difficult for the agency to assert the diligent prosecution exemption and bar a citizen suit. Thus, the private enforcer under the Water Act stands more "in the shoes of the government enforcer" than a plaintiff under the other citizen suit provisions, and has correspondingly more leverage over the target of the enforcement action.

H. Fees and costs. The citizen suit provisions encourage citizen plaintiffs to bring actions by authorizing the courts to award litigation costs, including reasonable attorneys' and expert witnesses' fees, "whenever the court determines such award is appropriate."[32] However, the statutes provide little guidance on the controversial issues of what fee levels are "reasonable" or when it is "appropriate" to award them.

Thus, like many regulatory statutes, the citizen suit provisions left open a great many questions and problems to be resolved in subsequent litigation. Over the interviewing period of slightly more than a decade, the two most frequently used statutes, the Clean Air and Clean Water Acts, have provided enough experience to support some generalizations about the patterns of claims and defenses asserted, the courts' reactions to them, and the emerging role of the citizen suit in environmental regulation.

III. PATTERNS OF USAGE

Citizen suit litigation under the Clean Air and Clean Water Acts can be divided into two distinct time periods. Before 1982, these statutes were only rarely used for their expressed purpose of seeking penalties or injunctions against violators. They were occasionally used during this initial period for the other primary purpose defined by the statute, forcing the administrator of EPA to take some regulatory action. Most frequently, however, the citizen suit provisions were used as a supplement to other forms of action for judicial review or damages.

After 1982, when the national environmental organizations mounted their private enforcement campaigns, the focus shifted dramatically, and private enforcement actions quickly came to dominate the reported decisions. Before examining these enforcement actions more closely, however, it is useful to review briefly the other uses of citizen suit provisions. Although they are proportionately smaller in numbers today than in the early years, these non-enforcement citizen suits remain an active field of litigation. Any balanced assessment of the citizen suit should therefore take account of the ways in which litigants are trying to use the provisions, and the effects of those uses on established forms of judicial review, on federal-state relations, and on the evolution of doctrines governing "true" citizen suits.

The classification system used to analyze these patterns of litigation divides the reported cases into six broad categories,[33] depending upon the primary purpose of the action: (a) *Jurisdictional maneuvering* cases in which the parties are attempting to use citizen suit provisions to expand or contract opportunities for federal court review; (b) *Dispute resolution* actions where parties are invoking private enforcement powers in an effort to resolve a two-party dispute over essentially private rights; (c) *Impact litigation* in which a plaintiff is trying to compel a policy decision or stop a development project; (d) *Enforcement actions* in which the plaintiff seeks to abate pollution; and (e) *Fee litigation* over the recovery of costs and attorneys' fees provided in the statutes. As described below, most of these general categories have distinguishable subcategories of cases, as well. Decisions in which citizen suit provisions were merely cited in passing or used by analogy in a different context were excluded from the data base. For the most part, opinions were fitted into one "best" classification, but in a few instances the same decision will appear in two categories. Thus, if an environmental organization filed a citizen suit complaint with two counts, one seeking sanctions against a discharger and the other trying to compel the Administrator to enforce, the case would be recorded both as a Private Enforcement action and as an Action Forcing case.

(a) Jurisdictional maneuvering. When a new form of action like the citizen suit is injected into a complex system of statutory and nonstatutory review, parties will often test the limits of the novel grant of jurisdiction. The jurisdictional cases which arose under the Clean Air and Clean Water Acts were subdivided into three categories: Alternative Judicial Review, Citizen Suit as a Defense, and Intergovernmental Conflict. Each of these topics requires separate explanation.

The occasion for an Alternative Judicial Review claim arises primarily from limitations in the special statutory review provisions of the environmental laws, and also from the system of "cooperative federalism" used to implement the Clean Air and Clean Water Acts. Thus, section 509 of the Clean Water Act[34] provides for federal appeals court review of EPA decisions granting discharge permits, issuing regulations, and taking other major actions--but only if the petition is filed within 90 days of the date of decision. Review after that time is precluded by statute unless the application "is based solely on grounds which arose after such ninetieth day."[35] A party who missed the 90-day limit for challenging a discharge permit, or who preferred to have the case considered by a district judge, might well invoke the citizen suit provision, claiming that the Administrator failed to perform some nondiscretionary duty in granting the permit.[36] Moreover, since both the Clean Air and Clean Water Acts give state governments a major role to play in implementing the statutes, parties dissatisfied with state actions may try to use the citizen suit to bring the controversy into federal court, by claiming that the Administrator of EPA violated nondiscretionary duties to oversee state enforcement.[37]

On the whole, there have been relatively few alternative judicial review actions litigated under these statutes, and even fewer in which the plaintiffs have prevailed. Only eight reported decisions were found under the Clean Water Act, and two pairs of those involved different stages of the same controversy. The courts rebuffed plaintiffs' claims in all but two cases, and the most significant of the latter two opinions was decided on other grounds.[38] There was somewhat more litigation of this nature under the Air Act, with 26 reported decisions tabulated. Many of these involved attempts by industry plaintiffs to compel approval of variances or to challenge regulations (14 cases). As in the Water Act cases, plaintiffs usually were not successful in using this route to the federal courts; the defendant (which was typically a federal or state agency) prevailed in 19 of the 26 decisions reviewed.

Citizen suit provisions can also be used as a jurisdictional shield as well as a sword. That is, a defendant in some other form of action may claim that the plaintiff's only route to federal court on this type of claim is under the citizen suit provision, and that the current action is impliedly precluded.

This defense has been raised with some frequency under the Clean Water Act, generating twelve reported decisions; however, no comparable cases have been found under the Clean Air Act.[39] Typically, a federal official such as the Administrator of EPA or an officer in the Army Corps of Engineers raises the defense, perhaps in the hope that the citizen suit limitation to enforcement of nondiscretionary duties will result in a narrower scope of review than the form of action chosen by plaintiff.[40]

The outcomes in this subcategory of cases have been mixed. Plaintiffs have withstood the citizen suit defense in eight out of the twelve cases, and in two others the decision has turned more on the discretionary nature of the administrator's substantive duty than on the route of review chosen by the plaintiff.[41]

The third group of jurisdictional cases is also small--totaling ten decisions under both statutes, some involving different stages of the same controversy--but they are relatively important in the implementation of the Air and Water Acts. They involve jurisdictional conflicts between the states and the federal government, typically centering on whether the state environmental agencies may assert regulatory jurisdiction over federal instrumentalities within their borders.[42] After some initial skirmishing in the lower courts, this issue reached the Supreme Court in 1976. In a pair of cases arising under the Clean Air and Clean Water Acts, the Court ruled that federal entities did not have to comply with state procedural requirements.[43] Congress responded by enacting clarifying amendments specifying its intent to subject federal entities to state regulation in the same manner as private dischargers.[44] Thus the citizen suit played a minor role in helping to resolve this significant issue of statutory construction.

(b) Dispute resolution. Citizen suits have often been invoked in support of plaintiffs' attempts to recover money, property, or other valuable rights, similar to the way that a common law action for tort or contract is used to resolve disputes between private parties. Once again, the cases within this general category can usefully be divided into three subgroups. The first of the component groups includes eight cases in which the plaintiff was trying to recover compensation for damages to persons or property suffered as a result of the defendant's pollution. These claims typically rely on a theory that the regulatory statute gives the plaintiff an implied right of private action. This type of damage claim was effectively foreclosed by the Supreme Court in 1981, when it ruled in the National Sea Clammers case[45] that there was no such cause of action for private damages under the Clean Water Act. At about the same time, the Court blocked another possible route to damage recovery by holding that the federal common law of nuisance applicable to water pollution had been preempted by the statutory enactments of the 1970s.[46] As a result of these two decisions, federal damage actions for private pollution injuries have been largely eliminated.[47]

A second category of dispute resolution cases involves claims arising out of grants and contracts, particularly the planning and construction grants for sewage treatment works provided by the Clean Water Act. Often, a disappointed bidder tries to use the citizen suit to obtain a judicial reversal of contracts awarded to someone else. Local governments and sewer authorities also use the citizen suit to contest what they believe are wrongful denials of their grant applications.[48] Of the seven separate disputes[49] that fell within this category, plaintiffs managed to survive motions to dismiss or decisions on the merits in only two.[50] One of these latter examples of a successful suit was an unusual case in which a private contractor apparently catalyzed a solution to a longstanding environmental controversy. In _Michigan v. Allen Park_,[51] municipal authorities had agreed in a consent settlement with EPA and the state environmental agency to build a sewage treatment system that would abate a serious water pollution problem. When the bids on the project came in too high, the municipal authorities reneged, and two disappointed contractors brought a citizen suit. The state environmental agency and EPA, initially joined as defendants, were realigned as plaintiffs by the trial court, and the original agreement was enforced under court order. In the district court's opinion, the contractors' citizen suit had provided a long-overdue spur to action: "[T]he system of justice has already let these people down [who live in the affected drainage basin]. A known health hazard has been permitted to exist for over 13 years while various administrative and judicial proceedings interminably ground along their way. Now we have at hand a solution to the problem . . . ."[52]

The third subcategory, local disputes, includes cases that are formally similar to the other kinds of citizen suits, but involve matters of such triviality or purely local concern that they seem inappropriate for the federal courts. Only four cases were placed in this category, three based on the Clean Water Act and one relying on both the Clean Air and Clean Water citizen suit provisions. They involved such weighty matters of national interest as a fight between two lakefront property owners in Wisconsin over a leaky septic tank,[53] a landlord-tenant dispute in rural Arkansas which somehow got mixed up with alleged water pollution from a hog farm,[54] and neighborhood opposition to a zoning decision in suburban Long Island that would permit "cluster housing" developments to be built among single-family residences.[55] Even if one strongly favors easy citizen access to the federal judicial system, it is difficult to avoid the conclusion that these disputes would be more appropriately heard by the local small claims court or zoning appeals board than by the United States District Courts. The judges deciding these cases evidently shared that view, since all of the plaintiffs' claims were rather summarily rejected.

The local disputes thus do not create any serious threat of clogging the federal courts with inappropriate litigation,[56] or of disrupting the structure of cooperative federalism built into the federal environmental laws. But they may create a risk of bad precedents if courts are too summary in seeking a plausible ground for dismissal. Hamker v. Diamond Shamrock Chemical Co.[57] illustrates the risk that important issues will be resolved in unimportant cases, without any apparent awareness by the court of the breadth and significance of its ruling. The plaintiffs in Hamker were riparian owners who sought recovery of damages to their property caused by defendant's oil spill. The citizen suit count was apparently included in the complaint as a way to bring state damage claims into federal court through pendent jurisdiction. The Fifth Circuit, noting that the alleged discharges had been confined to a two-week period two years earlier,[58] dismissed on the ground that the Clean Water Act's citizen suit provision requires the plaintiff to show that the defendant is in violation of an applicable standard or limitation at the time the suit is brought; past violations cannot be penalized or enjoined in a citizen suit.

The reasoning through which the court reaches this conclusion seems superficial in several respects. Starting from the dubious proposition that the legislative history need not be consulted because the statutory language is clear, the court asserts that its interpretation is correct because Congress gave the Administrator of EPA "the central role in the enforcement of the Act." However, this is by no means as self-evident as the court suggests. On the contrary, both the states and private parties are given a major role in securing compliance, and it would be more accurate to characterize the Clean Water Act as a system of shared responsibility for enforcement. In fact, the Hamker opinion may serve to undermine EPA's enforcement program in at least two respects. By leaving open the issue of whether EPA itself can bring an enforcement action solely for past violations, the decision invites polluters to challenge that agency's efforts to impose penalties. In addition, it ignores the fact that EPA was openly encouraging citizen suits at the same time that the Fifth Circuit was making it almost impossible to bring them.[59] With a single exception,[60] other courts that have considered this issue have rejected the argument that a "continuing violation" must be shown in order to maintain a citizen suit.[61] Nevertheless, the continuing violation argument has now become a standard part of the defense repertoire, and it will continue to take up the time of courts and litigants until this conflict in statutory construction is ultimately resolved. In this instance, it appears that the manifest triviality of the case lulled the court into making some bad laws.

(b) Impact litigation. At the opposite end of the environmental spectrum from local disputes are the impact cases, which are often big actions in several respects. They commonly involve multiple parties (including major national environmental organizations and industry trade associations), multiple claims and defenses, and high stakes for all concerned. They can be subdivided into the negative "stop development" suits that have been a mainstay of environmental litigation since the passage of the National Environmental Policy Act in 1969, and the positive "action forcing" claims that try to compel an administrator to make some decision such as issuing a rule or bringing a penalty action against a violator.

As their name implies, the "stop development" actions involve an effort by private parties to block some proposed project that requires federal support or approval. Public works construction projects such as dams and highways are the most visible targets of the stop development action, but any facility that requires a federal permit is fair game. Often these controversies become wars of attrition, with opponents struggling to delay action until the proposal becomes unattractive, uneconomical, or politically unpopular. Thus, any colorable cause of action, no matter how tangential, is likely to be pressed into service.

Citizen suits were used fairly frequently to challenge development,[62] with 19 reported cases found under the Water Act and 24 under the Air Act--including a few cases which appeared on both lists when the plaintiffs claimed that the proposed development would pollute both air and water. Cases with a half dozen or more claims for relief were not uncommon, and in some of these the air or water claims were really peripheral or "add-on" causes of action to complaints that were really grounded on NEPA or state law objections. On the other hand, a few of the stop-development cases touched upon important issues of air or water resource policy, such as the South Carolina Wildlife Federation's claim that dams should be regulated under the Clean Water Act as point sources because of their effects on the temperature and oxygen content of downstream waters.[63]

While stop-development cases were fairly common, successful suits--at least in the legal sense--were rare. Only one of the 23 Air cases resulted in an injunction against the developer.[64] In the Water Act citizen suits, only about a third of the reported case rulings on motions to dismiss or on the merits went in the plaintiffs' favor. Of course, the judicial forum may not be the most significant arena for these controversies; and unfortunately the reported decisions do not reveal how often the objectors were able to wrest design modifications from the developers, or force abandonment of the project altogether, as a result of their litigation.

The other category of impact litigation, action-forcing, presents a more mixed picture.[65] The Clean Air Act citizen suit provision produced more cases, and more successful outcomes for the plaintiffs. Out of 17 Air Act cases, ten resulted in total or parital victories for the plaintiffs. Some of these involved important regional air quality issues, such as the New York City transportation plan[66] and the Pennsylvania auto inspection and maintenance program.[67] Others spurred EPA to undertake standard-setting proceedings as mandated by statute, including rulemaking on national ambient air quality standards for lead and toxic pollution limits for arsenic and radionuclides.[68] Interviews with EPA officials confirmed that action-forcing suits can sometimes serve a useful function in breaking bureaucratic logjams and forcing the agency to make hard decisions. As one of them described the process:

> [I]tis very hard to get [the program office] to move on a regulation unless there is a court deadline. ...[And] it is not just the program offices. There are some other players inthewhole regulatory game[that] these deadlines affect. One, obviously, is the Office of Management and Budget. Frequently they don't want to come out with certain types of regulations; they like to sit on them and fiddle around with them. ... [W]ithin the agency ... we have our own little ... OMB here, the Office of Policy, Planning and Evaluation. And they review regulations for cost impacts and things like that, and oftenserve to slow things down. They want more study. They want more basis for a regulation, they want you to consider all these options to cut the cost of the regulation. ...[I]t is very hard to get anybody to move on a particular regulation and get it done. Everything is just sort of moving at a snail's pace. It will all get done eventually, but we don't seem to be prioritizing. ... I have seen regulations just sit for no apparent reason.
>
> Q: Just becuase there are too many things to do?
>
> A: Too many things to do, you run into a bottleneck at the management level sometimes. You have all these little workers down at [the operational] level who are working on regulations, and the number of people they have to go through gets smaller and smaller and smaller as you get to the top, and the

> [high-level] people just don't have enough time ....

Of course, the citizen suit would be a rather mixed blessing if it speeded up the administrative process at the expense of reduced quality in the decisions made. However, this study did not uncover any serious concerns that action-forcing suits were having this effect. Rather, the suits seem to function as a partial antidote to the familiar bureaucratic inertia summarized in the maxim quoted above, "It will all get done eventually."

Action-forcing was less frequent under the Clean Water Act, with twelve reported decisions in seven separate controversies. Three of the seven action-forcing controversies resulted in unequivocal losses for the environmental plaintiffs; in the others, the plaintiffs' claims survived in whole or in part. Even when the plaintiffs did not prevail, they at least raised some issues of national significance relating to EPA's authority to regulate radioactive effluents[69] and discharges from dams,[70] as well as the Administrator's duty to issue an abatement order when he has reason to believe that a discharger is violating its permit.[71]

(d) Enforcement actions. Suits to enforce environmental requirements against noncomplying dischargers are theoretically the heart of the citizen suit provisions, and this category comprises a substantial and growing body of cases. Its seems useful to distinguish among three subgroups of enforcement actions: pollution abatement suits, private enforcement actions, and intervention cases. The first two are very similar, in that they generally feature a private party or nonfederal official seeking relief against a regulated discharger. The distinction lies in the fact that the pollution abatement claims incorporate multiple counts under diverse statutes (and typically have multiple parties as well); the private enforcement action, by contrast, is based solely on the citizen suit provision. And, as its name suggests, the intervention cases is an attempt by an outside party to intervene in an ongoing enforcement action brought by somebody else.

Like the "stop development" cases,[72] the pollution abatement suits feature a number of major environmental battles, including decontamination of the damaged Three Mile Island nuclear reactor,[73] discharge of naval weapons in the waters of Puerto Rico,[74] ocean dumping of sewage sludge in the New York Bight,[75] and the continuing controversies provoked by inadequate sewage treatment capacity in metropolitan Washington, DC.[76] These suits have mostly been brought under the Clean Water Act,[77] perhaps because there is more statutory overlap in that field than in air quality. The total number of major pollution abatement cases is rather small, although the volume of litigation seems to be picking up in recent years. There is no clear trend in the outcome of the decisions.

The growing volume of litigation is more dramatic in the subcategory of "true" private enforcement actions, at least under the Water Act.[77] Only two reported private enforcement decisions were found for the period from 1972-79. Since that time, however, at least twenty-eight decisions have been published and many more are in the pipeline. Almost all of these are suits by national or local environmental groups against industrial dischargers. The more recent cases are dominated by rulings on a variety of motions to dismiss, which have usually gone in the plaintiffs' favor.

Cases involving the citizen's right to intervene in a government enforcement action were heavily skewed toward the Water Act, with seventeen decisions under that statute as opposed to only two under the Air Act. As in the private enforcement cases, there is a dramatic recent upsurge in reported decisions: only four of the seventeen Water Act opinions were written before 1980. State and local government entities were frequently involved in intervention cases, as the following table indicates:

TABLE A
PARTIES IN CLEAN AIR AND CLEAN WATER ACT
INTERVENTION DECISIONS
(Excludes multiple decisions in same case)

	Plaintiff	Defendant	Intervenor
Federal Govt	7	3	0
Fed. & State Govt	3	1	0
State/Provincial Govt	2	1	7
Munic. Govt	1	1	0
Industry	0	10	2
Natl Env. Group	3	0	1
Local Env. Group	0	0	5
Local Citizen Group	0	0	3
Individual	0	0	1

This table seems to suggest that resources can be significant in determining who will bring cases, and who will intervene. The relatively well funded entities--the federal government, some state agencies, and the national environmental organizations--usually litigate as plaintiffs and defendants; local groups and individuals try to intervene in someone else's action. Perhaps even the possibility of recovering attorneys' fees is not a sufficient financial inducement for many local interests to bring citizen suits in their own behalf.

In light of the statute's explicit grant of the right to intervene, it is surprising to find that putative intervenors had a relatively dismal success rate: in twelve out of the seventeen controversies reflected in the reported decisions, the intervention petition was either rejected on some technical ground, or denied on the merits. In several of the cases where the government and the alleged violator had reached a consent settlement, the courts seemed extremely reluctant to let any third party upset that agreement and force the matter to trial.[79] Thus, intervention seems to have played an insignificant part in the enforcement of these statutes.

(e) Fee cases. There has been a smattering of litigation under the fee award sections of the citizen suit provisions, totalling twelve cases under the Air Act and seven under the Water Act. There is nothing remarkable in either the pattern or content of these decisions; they seem very much of a piece with cases arising under other fee award statutes. In the few instances when parties have tried to stretch the citizen suit fee provision to cover other types of claims and defenses, the courts have generally been unsympathetic.

On the whole, then, the reported decisions reveal very few problems with the citizen suit. The total number of cases reported under these two statutes is modest, especially when viewed against the aggregate volume of federal court litigation. Many of these cases raise significant issues of law or policy, and most of the rest could have been brought under other federal statutes even if there were no citizen suit provisions. In any event, the courts seem to have little difficulty in disposing of inappropriate cases. With the possible exception of intervention, these citizen suit provisions generally seem to be working the way the Congress intended. However, it must be remembered that the reported decisions are only the tip of a large and growing iceberg of private enforcement actions.

IV. PRIVATE ENFORCEMENT IN PRACTICE AND IN THEORY

A. The Scope and Objectives of the Private Enforcement Campaign

Behind the reported cases looms a large body of private enforcement activity; however, the precise dimensions of the environmental groups' enforcement campaign remain obscure, because there is no comprehensive official source of descriptive data.[80] The best data source available was compiled by the Environmental Law Institute in 1984.[81] It shows that more than 100 notices of violation were sent under the Clean Water Act in 1983 and the first four months of 1984, and that nearly 90 private court actions were filed during the same period.[82]

ELI also developed some data about the outcomes of citizen suits.[83] Those of most interest are the cases generated by the national and regional environmental groups under the Clean Water Act, which comprise a majority of all citizen suits in the ELI data base. Out of 349 total citizen suits tabulated by ELI, some 214 were brought under the Water Act; and nearly 90 percent of these were generated during the environmental groups' current campaign.[84] The status of those cases at the end of April, 1984 was as follows:

TABLE B
OUTCOMES OF CWA CAMPAIGN CASES

Out of 179 total cases opened by sending notice letters to alleged violators --

* 27 (15%) were dropped without filing a complaint:

-- 8 were preempted by governmentenforcement
-- 1 was settled
-- the remainder were dropped for "other" reasons

* 67 (48%) were pending with no complaint yet filed:

-- almost all of these (63) were in negotiation

* 85 (37%) had progressed to the stage of filing a complaint in court:

-- 10 had settled
-- 74 were pending before the court
-- 1 had closed for other reasons

These proportions can be expected to change significantly over time. For example, the numbers of court filings will almost certainly increase even if more parties are willing to settle, because most plaintiff and defendant organizations will want to embody their agreement in an enforceable court decree. Similarly, the proportion of cases pending will probably decline, and the proportion of cases settling will probably increase, as judicial decisions emerge which provide a framework for resolving various matters currently under contention. Overall, however, these figures and our interviews suggest that both plaintiffs and defendants are settling in for some serious negotiation and litigation. Parties on both sides seem to regard this as a long-term phenomenon that is not likely to go away in the near future. To understand why this is so, it is necessary to consider the purposes of the plaintiff organizations that are bringing them, and the background of EPA enforcement that gave rise to current wave of citizen suits.

In part, the current wave of private enforcement cases grew out of the perception among many environmental groups that the first Reagan Administration was rapidly undermining compliance with environmental laws. This perception was fed not only by the managerial turmoil at EPA, where demoralizing reorganizations were frequent and scandals forced high-level officials to resign in disgrace,[85] but also by declines in the numerical indicators used to measure compliance and enforcement. Case referrals from EPA to the Department of Justice for prosecution dropped dramatically from the baseline of the Center Administration.[86] Commerce Department figures showed that investment in new pollution control equipment, which should have been increasing in response to new regulatory requirements, was in fact declining.[87] And the General Accounting Office, surveying a sample of industrial discharges subject to permits under the Clean Water Act, found that more than 80 percent of them had violated their permits at least once during an 18-month period.[88] As statistics like these began to emerge from multiple programs administered by EPA, critics concluded that there had been a "collapse in compliance with the nation's toxics laws."[89] The citizen suit thus might be viewed as a stopgap measure, a way for environmentalist constituencies to put their fingers in the dike until the agency could recover from its time of troubles and resume its responsibility for enforcement.

However, in reality the story is more complicated than this. The shifts in enforcement policy and practice inaugurated by the Reagan appointees at EPA may have precipitated the private enforcement movement; but there were forces already in place that made large-scale private enforcement possible, and could well have brought it into existence even if there had not been such visible turmoil at EPA. These forces include the people who are organizing and staffing the citizen suit movement, the learning process that had taken place in the field of environmental enforcement, and the changes in beliefs relating to regulatory compliance and enforcement that were occurring in the early

1980s.

By the time that the Reagan Administration took office in 1981, the Environmental Protection Agency had been in existence for more than a decade. A generation of lawyers and technicians had reached their professional maturity along with the agency.[90] Regardless of whether they had worked inside EPA, or in one of the outside constituencies that dealt frequently with it, or both, these professionals had steadily developed their skills and contacts. Thus, they understood how the various programs and offices at EPA worked -- or failed to work -- and how to influence the process. At the same time, many of them still had the idealism and commitment to environmental values that had originally attracted them to this field of regulation. As they moved out--or were forced out--into private-sector bases in law firms, environmental groups, and research organizations, they provided the foundation of expertise and commitment needed to build the citizen suit movement.

Like EPA itself, many of these environmental professionals had learned a lot about regulatory enforcement during the 1970s. When it was created by Executive Order in 1970, EPA inherited a legacy of failed enforcement in federal antipollution law, and a militant environmental constituency that wanted an immediate turnaround. Thus, EPA's initial problem was to establish some credibility as a tough enforcer. As John Quarles, the Assistant Administrator for Enforcement in the early days, put it: "EPA responded to the pressures of the grassroots political protest. The response was reflected most clearly in [Administrator William Ruckelshaus'] approach to enforcement."[91] That approach was to bring a series of highly publicized court actions against polluters, using the old Refuse Act and whatever other statutes could be pressed into service.[92]

Serious pollution problems were widespread at that time, and many violators were obvious, well-known targets for agency enforcement.[93] Thus, implementing enforcement policy was a relatively simple matter of selecting the most deserving from a large number of potential defendants, and making an example of them. Even during this initial period of active enforcement, however, it became clear that merely bringing a series of highly publicized cases was not enough. The cases had to be pushed and prodded through the judicial system to a successful conclusion,[94] and then the resulting decision had to be translated into the polluter's actual abatement of his discharge.[95] Moreover, an effective administrative infrastructure had to be built so that detailed, readily enforceable standards would be in place,[96] and the regulatory bureaucracy would produce the appropriate number and mix of enforcement action.[97] As one participant in EPA's early enforcement efforts put it, "[t]he public demand for assertive action against polluters had made its first impact through individual decisions by leaders in the top political positions. Now the response to that public demand was being institutionalized."[98]

By the mid-1970s, EPA was ready to embark on a systematic program of relatively vigorous enforcement, using new management systems and economics-based enforcement policy. These changes are generally associated with the Carter Administration, but they actually began in 1975 with the creation of a separate enforcement office at EPA headquarters.[99] Regional enforcement personnel reported directly to that office, and the agency began to put emphasis on generating large numbers of penalty cases.[100] Eventually, the enforcement office became heavily involved in writing permits so that violations could be more easily prosecuted.[101]

The major substantive policy development in enforcement during the Carter era was the systematic application of economic concepts to enforcement penalty policy. However, this was not the standard microeconomic approach of making overinclusive rules more efficient by applying a cost-benefit calculus at the enforcement stage; rather, it was an attempt to use economic means for environmental ends by adjusting penalty levels to recapture the presumed economic benefits of noncompliance. This concept was first applied on a large scale in the Connecticut Department of Environmental Protection in the early 1970s, and it was brought to EPA during the Carter Administration by William Drayton, Douglas Costle, and other alumni of the Connecticut DEP.[102] Complex rules and computer programs were generated to calculate the expenditures saved and competitive advantages gained from a particular instance of noncompliance.[103]

While the late 1970s appear in retrospect to be the most activist enforcement period in EPA's history, there was still some nagging problems. In 1978 the General Accounting Office issued a report sharply criticizing EPA's enforcement of the Water program--which was probably the agency's most fully developed enforcement effort.[104] For some environmental organizations, this report marked the beginning of a serious loss of faith in EPA's enforcement capability. A few, like New Jersey PIRG, began taking a skeptical look at what was actually happening in the enforcement offices in their areas. The closer they looked, the more concerned and disenchanted they became.

The 1981 appointment of Anne Gorsuch Burford as Administrator of EPA brought a dramatic change in the agency's enforcement philosophy, and accelerated the loss of faith in government enforcement. Voluntary compliance negotiations became the dominant method of dealing with pollution violations. Reagan Administrators were told to pursue "every opportunity for settlement," and referrals of cases for prosecution were regarded as "black marks" against the official recommending penal action.[105] Amid multiple reorganizations of the agency, the separate enforcement offices were abolished and their personnel reassigned to the program offices or the General Counsel's office.

Agency morale, especially among personnel engaged in enforcement, reportedly declined as rapidly as the case referral statistics. The environmental community, which had not been wholly satisfied with EPA enforcement during the Carter Administration when many of its own people were running the agency, was now engaged in open political warfare against the EPA leadership. By the time William Ruckelshaus was brought back as Administrator in 1983, words like "chaos" and "shambles" were being used to describe the EPA enforcement program. The basic task that Ruckelshaus faced was very much like the one he had taken on more than a decade before as the agency's first Administrator: establishing EPA's credibility as a tough enforcer. This time, however, success would prove somewhat more elusive.

Perhaps because budgetary and political constraints foreclosed major policy initiatives, the second Ruckelshaus Administration devoted much of its attention to rehabilitating and improving EPA's management systems. In rapid succession, numerous procedural and substantive changes were put in place to revamp the enforcement process. The Gorsuch reorganization of enforcement was partially reversed, and a new Office of Enforcement and Compliance Monitoring was created to oversee and coordinate EPA's enforcement efforts.[106] Working groups were directed to systematize and codify the definition of significant noncompliance to assure some consistency across regulatory programs,[107] and also to review statutory penalty procedures and amounts with a view toward unifying the formal legal structure of enforcement.[108] Case tracking systems were upgraded so that enforcement officers could follow the performance of significant violators until they reached compliance, and also make sure that cases did not get lost.[109] An attempt was made to clarify the allocation of authority between EPA and the state environmental agencies, and to establish management oversight systems which would measure the states' performance in their areas of responsibility.[110]

Finally, the Ruckelshaus Administration tried to increase the number of enforcement actions by setting quantitative targets for the regional offices, and by exhorting the staff to get tough on violators. In January of 1984, Ruckelshaus gave a speech to agency enforcement personnel that is generally known as "the Gorilla Speech" because of the metaphor he used in urging his people to crack down on lackadaisical state enforcement: "Our responsibility is not to get along with the states, it is to insure compliance. ... Unless [the states] have a gorilla in the closet, they can't do the job. And the gorilla is EPA."[111] The gorilla quote set the tone for most press coverage of the speech,[112] but more interesting for present purposes is the sense of frustration and impotence that Ruckelshaus conveyed in describing his attempts to revitalize federal enforcement:

> What I was concerned about, frankly, in coming back here was that we had a bunch of tigers in the tank, and the minute we took the lid off ... and said "Go get them!" the problem might well be an overreaction--that we might start treating people unfairly, just to show everybody how tough we were.
>
> Well, I think we opened the tank all right, but on the basis of what I see here the last few months, there may be more pussy cats than tigers. ...
>
> ... Isent a memo on October 7 to all the Assistant Administrators and Regional Administrators. I repeated what I said in my confirmation hearings, and I indicated in as clear a language as I could that in order to achieve compliance with the laws and regulations, EPA must have an enforcement program that is credible and effective. ...
>
> Now these statistics [on case referrals] are terrible. ...
>
> ... We can find 100 reasons _not_ to do something in terms of organizational structure, guidance, you name it. There ought to be 100 reasons _to do_ something. We have to develop a certain controlled sense of outrage in this agency if we are going to get these laws enforced. And some place along the way, we have lost that.[113]

While the second Ruckelshaus administration at EPA achieved some improvement in the numerical indicators of enforcement activity, the rapid shifts in agency policy left a legacy of skepticism among knowledgeable observers inside and outside of the agency. Structurally, the Ruckelshaus reforms had only partly undone the Gorsuch reorganizations: the operational people in the enforcement process still reported to the program offices and the General Counsel's Office rather than to the New Office of Enforcement and Compliance Monitoring. In this realignment, enforcement duties are likely to have lower priority. As one agency staffer described it:

> Our biggest problem right now is that none of the old compliance people are left. They

> all got moved out ... to other jobs, or moved out to field offices, pushed over to the Environmental Services Division. ... There's whole regions where there isn't one person left from compliance three years ago. It's all construction grants people [now]. ... Whenyou've been giving out construction grants for ten years, you've basically been wearinga white hat, and you're a good guy. ... Andwhile you're still a good guy on the one hand, to turn around and put on the black hat and slap somebody [with a penalty] .... [T]hese people just aren't going to do anything.

More basically, the representatives of groups bringing citizen suits had come to believe that improved management of the enforcement process was necessary, but not sufficient. Even good management of inadequate resources would not produce compliance, and the resources seemed likely to remain inadequate for the foreseeable future.

> The weakest link in the entire federal regulatory scheme always has been and always will be enforcement. Because you're just never going to have the resources. No matter what the law is ... the country is never going to be able to put the resources into these [programs] to do what the law intended. ...

If this is true, then EPA and its supportive constituencies should move toward a specialized division of labor in which the regulatory agency essentially cedes control over routine penalty actions to private enforcers, and concentrates its efforts on the novel, difficult and expensive areas of enforcement:

> [O]f all the different cases around, these are the cases we [in the private sector] do the best and it's [least necessary] for them to do it. [At] the meeting we had with Ruckelshaus, he kept coming back: "Well, if you're doing this, we must not be doing something we're supposed to." And I was trying to say to him, "I don't want you to start spending your resources here. Go after those damned [toxic waste] dumps. I mean, they're hard. They take money, they take a million experts. Go do that, don't go taking your scarce manpower and coming in with these middle-level water cases. ... [W]e'lldo a good job with this. ... I

> don't think you've done a good job on the things that really were important, much more important than this. So don't go diverting your resources into this . ..." ... They're not going to get a five hundred percent increase in their enforcement personnel, and there are lots of other things that are not being enforced.

In this vision of the citizen suit, private enforcers would essentially enter a long-term partnership with their government counterparts,[114] pooling their resources to achieve the common goal of increased compliance. If this goal is to be realized, private enforcers will have to overcome a series of obstacles. Perhaps the most fundamental of these is altering the behavior of regulated industries. Contemporary deterrence theory raises several questions about the likely responses of regulated firms, and the efficacy of different enforcement strategies.

B. Three Contemporary Views of Regulatory Enforcement

In recent years, commentators from a wide variety of disciplinary perspectives have produced in substantial body of literature on regulatory enforcement. These analyses are primarily concerned with the effects of different enforcement strategies, but they also imply divergent views regarding the legitimate use of authority in the regulatory state.

1. An Economic View: Over-Inclusive Rules, Inefficient Enforcement

The economic perspective, which is probably the most widely used approach to analyzing regulatory enforcement, is based on the premise that all regulation should be efficient. That is, (1) the benefits of regulation should always exceed its costs, (2) the least costly means of achieving a given set of benefits should be utilized, and (3) the benefits achieved by a regulatory program should ideally approximate those that consumers would purchase if a market in regulatory benefits existed.

In practice, economists differ in the way that they apply efficiency analyses to social regulation; but for the most part they begin with a deep suspicion of rule-based "command-and-control" regulation like that found in the major federal environmental statutes. Rules are suspect because they may be addressed to phenomena that are not, strictly speaking, market failures justifying regulatory intervention;[115] or they may create inadequate or perverse incentives among the regulated.[116] Even if the agency is willing and able (legally, politically, and otherwise)[117] to take account of these problems in its rulemaking, it will still face a difficult tradeoff among social costs, rulemaking costs,[118] and compliance costs that may compel it to issue broad, categorical rules:

> In order for legal standards to be cost-effective, the standard-setting body must possess considerable information on the technological and economic conditions surrounding abatement and the degree of harm caused by hazards. The cost of collecting and processing this information will tend to limit the extent to which standards match the least-cost method of abatement. ... In addition, the standard-setting body will be involvedin consultation with ... regulated and interested parties, ... giving rise to another set of costs (negotiation and consultation costs) associated with the standard-setting process itself and delay in the enactment of regulation.[119]

Finally, the costs of compliance may differ significantly among firms in any given regulatory category. Thus, command-and-control rules based on assumptions about average costs may impose requirements that are too stringent for some firms, and too lax for others. For all of these reasons, the standards to be enforced are likely to be over-inclusive in forcing some regulated firms to undertake compliance activities that are not cost-justified.[120]

Whatever the cause, if a rule is overinclusive, then "full" or perfect enforcement will be socially counterproductive. Rather than mechanically seeking to compel obedience to such rules, an economically rational enforcer would attempt to identify situations in which application of the rules serves the cause of efficiency, and then try to induce compliance among regulated firms in this category of situations. That is, the efficient enforcer would try to cut back the scope of the rules at the enforcement stage, in order to maximize "the value of the social utility produced, as measured by the harm prevented, less the enforcement costs incurred."[121]

The dominant assumption in the economic literature is that achieving the level of compliance thus defined is largely a matter of manipulating the costs and benefits of rule violation, as perceived by the regulated.[122] Since they are rational actors, regulatory targets will respond to the size of the potential penalty, discounted by the probability that they will escape liability. Thus the regulators may generate the appropriate level of compliance by adjusting either the likelihood of detection and conviction, or the size of the penalty.

There are some serious oversimplifications in this model of regulatory compliance, as most economists would be quick to admit. The indeterminacy of marginal calculations of social cost and beneift,[123] the variance among possible responses of regulated firms even if one assumes economic rationality,[124] and the manifest social and legal constraints on rational maximizing[125] are all examples of problems that have been discussed in the regulatory enforcement literature. Still, the main thrust of the economic view of the regulatory process has attracted widespread support: regulation should be efficient in both its means and its ends. How, then, will private enforcement measure up against the standard of efficiency?

In his 1975 preliminary report to the Administrative Conference on private enforcement,[126] Professor Jerry Mashaw developed several interrelated hypotheses which would support the conclusion that private enforcers are more efficient than regulatory agencies: citizen enforcement may be less costly than official enforcement; the private enforcer may sometimes be in a better position to judge the costs and benefits of a particular prosecution than government officials; the legislature has made a judgment that private enforcement is necessary to increase the total amount of resources available for prosecution; and the threat of competition will stimulate public enforcement efforts. These propositions find some support in the theoretical writings of economists like Goerge Stigler,[127] but as Mashaw points out they have not been empirically validated in the context of citizen enforcement of regulatory laws, and they seem suspect in several respects.

Later theoretical writings have concluded that, just as it is difficult to create incentives which will induce regulated firms to undertake the appropriate amount of abatement activity, so also is it difficult to provide the necessary incentives for private enforcers to undertake the optimal level of enforcement, or something close to it.[128] While government prosecutors are on the public payroll and therefore might be expected to make some effort to weigh the overall public costs and benefits of enforcement activity, private enforcers are (if one subscribes to the standard public goods analysis) much more likely to give weight to purely private gains and losses, such as the estimation of whether the enforcement action will produce an adequate bounty for the enforcer. In a variety of ways, they may look to their own short-term benefits rather than to the aggregate, long-term effects of a particular penalty action. Thus, to answer the question wehether private enforcement is desirable, one has to address a difficult second-order incentive question: Does the statutory grant of powers and benefits to enforcers, plus whatever other incentives might exist to induce private enforcers to bring suit, generate a number and mix of prosecutions which (when added to the number of cases brought by public enforcement authorities) is closer to the social optimum than the number and selection of cases which would be brought by public prosecutors in the absence of such private enforcement authority?

Even in this relatively simple form, the economic analysis of private enforcement quickly becomes very complicated; and there is very little empirical information available. Consequently, analysts are likely to fill this gap by returning to their initial assumptions. If the initial premise is that many regulatory rules are overinclusive and that some form of cost-benefit reasonableness is desirable at the enforcement stage, then one is likely to run the presumptions against private enforcement and demand some showing that citizen prosecutors are more likely to approach the social optimum than their government counterparts. Prosecutorial discretion, in this view of the regulatory process, is an important safety valve against the inherent rigidities of command-and-control regulation, and it should not lightly be abrogated by deputizing private parties to override a public prosecutor's considered decision to refrain from action.

2. An Activist View: Underinclusive Rules, Negligible Enforcement

Where economists (and, to some extent, representatives of the regulated industries) see the regulatory system caught up in rigid rules and inefficient enforcement policies, observers who are more sympathetic to the regulatory mission of the Environmental Protection Agency see instead laxity, indecision, and drift. One lawyer representing plaintiffs in citizen suits articulated it forefully:

> The present system ...[is] all mush. The company [subject to a permit under the Clean Water Act] violates, has a hundred violations. Now what does it do? It might do nothing. ...[I]t might come down and talk to the agency a little bit and say, "I'm having a ... problem." Maybe they're a little nervous so they say, "Well, we'll ask for a permit change [to authorize the discharges]." Well, the agency looks at it, and you know the agency has got a pile of permits around [awaiting action]. And nothing happen[s] for years. Nobody pays any attention, the permit runs out, nobody cares, [nobody] is paying any attention.

In this view of the process, both the substantive standards embodied in permits and regulations and the enforcement practices of the responsible agencies fall far short of protecting the society from unacceptable harm from pollution.

To understand the sources of this perception, it may be helpful to take a brief look at the statute most used in private enforcement, the Clean Water Act, as seen through the eyes of citizen plaintiffs and those who share their beliefs. Like many environmental laws, the Water Act is a complex statute covering multiple agency decision points, each of which presents opportunities for the decisionmaker to be "tough" or "lenient." Since the 1972 legislative amendments,[129] the primary tool for pollution abatement under the Act is the discharge permit for point sources (industrial or municipal waste outfalls), and the primary means of giving content to the permits are "effluent limitation guidelines" or rules promulgated by EPA defining the appropriate control technologies for each category of polluting industry.[130] Despite a legislatively-imposed one year deadline for the issuance of effluent guidelines, EPA was unable to make rapid progress; and in 1975 the Natural Resources Defense Council won a judicial victory compelling the agency to follow a set schedule for initiating effluent guidelines rulemaking.[131] Since that time EPA has managed to promulgate a number of guidelines, but the proceedings are usually controversial, protracted, and followed by multiple petitions for judicial review.[132]

In the absence of effective effluent guidelines, the permitting authority (which may be either EPA or a state agency implementing a control program approved by the Administrator) is forced to rely on his or her "best professional judgment" when drafting permit limits. "BPJ," as it is known in the trade, permits considerable latitude for administrative discretion; and according to some of the knowledgeable observers intereviewed in this study, that discretion is often tilted in the direction of leniency. One plaintiff's lawyer reported, "I've seen permits, for example, that have ten, fifteen thousand pounds BOD [biological oxygen demand] limit, and fifteen thousand pounds COD [chemical oxygen demand] limit, together. And they still [violate their permits]. I mean, I can't begin to tell you some of the permits I've seen. ... [W]e're talking Grand Canyon loopholes for some of these things." An EPA official provided some corroboration:

> You get some real good permits, and you get some trash. [One EPA Region] is famous for writing bubble permits .... It's supposed to be illegal but they average together all the outfalls. And then what are you going to do? ... You get a company with ten different processes, and they get to average together everything for their organic loading, for some toxic organic, and they just don't run two or three of the lines on any given day. You get to average in the zeros ... [I]t works out very well for the company's production management. He doesn't ever have to worry about his permit limits. ... That

> gets rid of a lot of cases that might be good, but the permit's just written so loosely that there's not much you can do with it.

Even when effluent guidelines govern the permit-writing process, there may be some grounds to question their stringency. EPA generally has based the guidelines on a "99 percent confidence interval," the level of pollution control that the best existing facilities have been capable of meeting 99 percent of the time.[133] Thus the specified technolgoy may fall short of what could theoretically be accomplished even with available technology, if that technology has not yet been adopted by existing plants; and the guidelines' stringency may be further tempered by the economic considerations specified in the Act.[134] Moreover, industries have succeeded in building into the system some slack for unexpected or unique situations. One important category of exceptions is upsets and bypasses. An upset is a malfunction of waste treatment equipment for reasons beyond the operator's control, while a bypass is a routine shutdown of control equipment for maintenance. Several cases have held that EPA must make some allowance for upsets and bypasses, and its regulations now have standard provisions forgiving some of these exceedances of permit limits.[135] Variances are also available for plants whose production processes exhibit "fundamentally different factors" when compared to the facilities considered in developing the effluent guidelines.[136] As the EPA official who was previously quoted described the permit-writing process, application of the effluent guidelines can produce an "amazingly lenient" permit:

> If the effluent guidelines ... [provide that] you [as a regulated discharger] ought to be able to meet [a limit of] a hundred pounds [of a particular pollutant] per whatever [volume of] production you've got, by the time that they look at the variances in there, put in the 99 percent, that limit may go up to two hundred or three hundred pounds because you can ... statistically compute that maybe someday you'll get up there. And they may even have two or three years of operating data at the facility [showing] that they've never gotten up there, so [the permit] is higher than the highest limit ever recorded; but yet statistically you can work it out where it says that one time in God know how many you're going to go above that limit and therefore you have to write the [permit] limit to allow for that. ... In a lot of cases, it's debatable whether you even have to put in the treatment technology.

In addition to any slack that might be built into the permit itself, there may be considerable slippage at the enforcement stage. As previously noted, the citizen suit plaintiffs and their lawyers typically view government enforcement as a process clogged with inertia and frequently unable to take any action (much less vigorous action) to compel compliance. Interview respondents assigned various reasons for the lack of agency enforcement under the Clean Water Act. One emphasized the inherent tendencies of bureaucracies to avoid hard decisions, and of regulators to avoid conflict with important constituency groups. Another felt that the EPA regional office staffs "would like to enforce," but are handicapped by lack of resources and internal agency regulations. Others pointed to the "enormous," "unbelievable" amount of paperwork required to process a referral for court action through the EPA hierarchy and the Justice Department. Whatever the reasons, they believed that government enforcement of the Act has deteriorated to the point where its deterrent value is negligible:

> There has been some enforcement, but not a lot of enforcement. And understand, when you start going through these permits, it's the rare company that complies. It's not the other way around. The permits are regularly and generally violated, and the only question is, what's the degree of violation? ... Most of these defendants will regularly say, "Well, we spent all of this money to try to comply, and we only had a little bit of violation, and why are you suing us ... because we're trying to work it out?" Or, "Our violation's not really causing any harm, why are you bothering with us?" ... There certainly is a sense in the corporate community that when they have a permit, they can violate that permit ... [T]hat's a truly felt, I think a sincerely felt, opinion. Unless the violation's very significant, there's no problem; the permits don't mean what the permits say.

Other plaintiffs' lawyers used analogies to define what they considered the proper enforcement approach to Clean Water Act violations. One cited the example of police enforcement of traffic speed limits, arguing: "People now know that if they get caught at over fifty-five miles per hour -- if they get caught at fifty-seven-point-five -- they've got to pay a penalty. ... [In the Water Act,] we've got to get out of that in-the-ballpark, the-permit-is-a-guideline concept. The permit is the law, and you will treat it like the law, or you will pay the legal penalties." Another respondent advocated "the Internal Revenue

Service model. They don't tell me on April 15, try to pay my taxes. They tell me I am to pay my tax bill. If I don't pay it, something bad happens to me. That's my model. That's what I think the Water Act is supposed to do."

This straightforward deterrence model implies a very limited role for prosecutorial discretion. One of the respondents quoted above interpreted the legislative intent behind the Water Act's citizen suit provision as a congressional directive that "once you set the permit numbers there shouldn't be any discretion. Undoubtedly there is a little bit, obviously if you violate the permit [just] once, nobody wants anybody charging into court to do something about it. But essentially Congress said, 'We don't want a lot of discretion. ... We want it to operate almost automatically.'" In this view, a government monopoly over prosecution would (and perhaps did, during the period when few private enforcement actions were brought) simply load more leniency into the regulatory system and seriously undercut voluntary compliance.

3. A Behavioral View: Contingent Power, Complex Social Reality

A third view of regulatory enforcement is more difficult to summarize than the economic and activist perspectives, perhaps because it emphasizes the complexities that the other two views tend to suppress. This third approach, which might be described as a behavioral perspective, does not deny the fact that the actors in a regulatory enforcement proceeding are in some respects rational analysts who calculate the net present benefits of alternative courses of action, and who respond to penal and financial incentives. But the behavioral perspective also holds that the actors in a regulatory enforcement setting exist within complex social and political structures which serve to create and distort incentives in their own right. Thus, to assess the effects of a device like the citizen suit, it is necessary to understand the social dynamics that surround a particular field of regulation, and the ways in which entry of private enforcers is likely to alter those relationships.

A starting point for behavioral analysis of regulatory enforcement is the assumption that neither the regulated firm nor the regulating agency can be treated like a single, utility-maximizing individual. On the agency side, there are a number of splits which serve to divide different subgroups of officials and create the possibility of conflict or strategic behavior. One of the most frequently described gaps is the tension between high-level policymakers and the "street-level" bureaucrats who actually carry out the detailed work of the agency at an operational level -- in this case, writing permits, conducting inspections, recommending prosecutions, and negotiating with industry spokesmen. As previously noted, the Ruckelshaus administration at EPA sought to reverse the voluntary compliance philosophy advocated by its predecessor and develop a more deterrence-oriented approach to enforcement.[137] One observer expressed skepticism that this turnabout would produce major changes in behavior at the Regional Office level, where much enforcement policy is effectively made:

> It's ... similar to a lower staff in a bureaucracy, a lower staff autonomy. They have to follow policy and everything else, but it's the way in which they follow policy. You know, headquarters says, "We want the major cases." Region hands up all their shit and says, "Those are our major cases." And who's going to challenge it? It's the same thing you know, if the secretary says, "I can't do it because the word processors are out," "The xerox machine is down." I mean you're stuck. It's not that they're not following what you are saying, it's just that there are all kinds of guerilla tactics. The Regions are great on guerilla tactics. They've got this down to a fine art.

Even at a particular functional level within an agency, regulators can vary in their approach to enforcement. James Q. Wilson distinguished among three basic types of government officials, based on their dominant motivation: careerists who are concerned primarily with the maintenance and survival of the agency; politicians who are using their administrative position as a stepping stone to other offices; and professionals who are concerned primarily with developing and displaying competence in a technical discipline.[138] In an agency like EPA, which has traditionally attracted substantial numbers of staffers committed to the agency's mission of protecting the environment, a fourth category of "idealists" should probably be added.

One interview subject noted that these kinds of career motivations and disciplinary differences can have a real impact on EPA enforcement activity:

> [Typically in the Regional Offices] you've got a water division director who's got ties to the community, he's got ties to the business community -- you know, they're basically engineers ... who are going to get out in the engineering field eventually, and ... they're not going to do anything controversial. ... It used to be the enforcement divisions were all run by attorneys. ... [T]raditionally, you find that lawyers are not as worried about their

> future. As a matter of fact, they may be helping their future the more aggressive they are, whereas exactly the opposite is going to be true for any water division director. ... It may be that [the lawyers] just don't understand the issues as well, you know -- the technical issues, so they don't have as many doubts in the back of their minds about what will work and what won't; whereas the water division director, being an engineer, usually has a lot of experiences and is more willing to accept excuses. Like, "Oh, we had a bad day," or "Somebody dropped a wrench." Lawyers just didn't want to hear it.

Another respondent familiar with the enforcement process thought that disciplinary differences might be less significant than personal experience and attitude: "I've seen good cases turned back because the lawyer didn't want to do it because it was going to be a tough case. Or because he had dealt with this attorney before and had gotten clobbered. Or he had dealt with this attorney before and he liked him."

As these excerpts suggest, there is evidently a good deal of pulling and hauling within the agency over the shape of enforcement policy, both generically and in individual cases. These conflicts are multiplied when state agencies are also involved in enforcing environmental standards. To be sure, many (perhaps most) of the responsible officials are trying to keep in sight some nonpartisan, objective vision of the public good. But for them, as for most of us, that vision is at times heavily colored by the multiple groups of "significant others" they live with and draw their support from. The sudden upsurge in private enforcement actions might well disrupt or challenge the network of norms, assumptions, and understandings that have grown up within EPA and its counterpart state agencies. Because such norms and understandings may serve negative as well as positive functions, disrupting them is not necessarily a bad thing. But it may be difficult to anticipate and understand all of the changes taking place in this complex bureaucratic environment. Widespread use of citizen suits thus raises the possibility of unforeseen upheavals in established enforcement relationships.

Similar observations have been made about the behavior of regulated firms. Legal sanctions may fail to penetrate to the appropriate operational levels of the company because of intervening bureaucratic or social processes.[139] For example, a former government attorney tells of an environmental enforcement negotiation in which the company was unwilling to settle because that would entail an admission of a very costly error by a high-ranking corporate official:

> The Senior VP for Engineering had no doubt designed the [treatment system]. So they couldn't chuck the stuff they had out there. And the reason they were having such problems was not that it was misdesigned in the sense that, yeah, the concept was good, but because the wind blew across the top of the great big lagoons and churned things up when they're supposed to be settling ponds. ... They sized it right and everything, but they forgot the indirect stuff.

An enforcer who fails to understand and deal with these dynamics in the regulated firm is likely to be ineffective, or even counterproductive. Recent studies of regulatory enforcement have concluded that the inspector who "goes by the book" and mechanically cites all violations without regard to seriousness or extenuating circumstances will likely be perceived as unreasonable, and may therefore provoke resistance rather than cooperation from the regulated.[140]

A more effective strategy may be to tailor enforcement responses to the reasons for violation. Thus, Professors Kagan and Scholz[141] have suggested that regulators need to distinguish among at least three different types of noncompliance. Some proportion of violations -- typically, a relatively small percentage -- will be committed by "amoral calculators" similar to the rational maximizers hypothesized in economic analysis. Since these firms respond primarily to the likelihood and severity of penalties, a deterrence strategy, backed by vigorous policing, is the appropriate enforcement technique. Another, and probably larger, portion of regulated firms can be characterized as "political citizens" who will generally comply with legal requirements, so long as they believe that those requirements are legitimate and reasonable. For this category of firms, the regulator has a twofold task: he must persuade the recalcitrant that the rules in question are sensible and necessary, and he must adapt the rules to meet valid business problems that would be caused by literal-minded enforcement. Finally, some noncompliance will be caused by organizational incompetence, such as lack of knowledge of pollution control technologies or failure to hire the right kinds of people to run a control program. In these situations, the regulator may be most effective in the role of a consultant who tries to educate the firm about better ways of dealing with pollution problems.

Making these kinds of distinctions, and selecting an appropriate enforcement response, can be difficult for an established government bureaucracy, as witnessed by the recent political troubles of agencies like OSHA and the Federal Trade Commission. But a citizen enforcer labors under some additional handicaps. For one thing, the government enforcer carries the legitimacy of the public official, which may have diminished in recent years but still commands a degree of deference and respect from the private sector. An environmental lawyer with experience in government described the difference in the following terms:

> The companies don't like it when EPA knocks on [their] door. They understand that EPA's got the right to do it, but they grouse about it and they get defensive .... And so it's difficult. It is more difficult by a hundred degrees when you've got a private citizen client and you're involved in this, because [they think], "Who the hell are you to tell me how to run my plant?"

Thus, the citizen plaintiffs have the initial problem of establishing their credibility and legitimacy as enforcers, an issue that often surfaces in the legal disputes over standing discussed below.

An additional problem is that citizen enforcers are generally following a much more vigorous enforcement policy than the responsible government agencies in at least two respects: the number and kinds of cases bought, and the level of penalties sought. This discrepancy is obvious to the regulated firms, and it can easily lead to the feeling that they are being whipsawed between inconsistent requirements, or treated arbitrarily. As a defense lawyer asked, "[I]s it fair today -- retroactively -- to go back and do something to these dischargers which the agencies themselves did not and would not have done, had they been in control and prosecuting? The point [of the citizen suit provisions] is to get the citizens to do what the agencies would have done ...." To some degree, this may be a transitional problem which can eventually be solved by some of the procedural techniques described below, such as greater elaboration of case selection criteria and penalty policy. In the meantime, however, the discrepancy between agency and citizen group enforcement policy seems likely to be a continuing source of friction between private enforcers and the regulated industries.

Thus, from a behavioral perspective one of the most important questions about the current upsurge of citizen suits is whether it will lead to a stable set of relationships among environmental constituencies, regulated industries, and regulatory agencies in which the private enforcement action is regarded as an established, legitimate and reasonable feature of the regulatory process.

In the first wave of private enforcement litigation, the simple deterrence model favored by the plaintiff organizations has largely been accepted by the courts. This is most evident in the unsympathetic treatment given to the various defenses asserted by dischargers, which is described in more detail in the following sections. Courts adjudicating private enforcement actions have frequently ignored technical defects in notice, and have routinely upheld standing based on a simple showing of harm to recreational and aesthetic interests. They have also narrowed the "diligent prosecution" bar, so that few government enforcement actions will prevent private parties from bringing suit on the same violations. On the merits, they have treated the permittee's discharge monitoring reports as admissions, and have generally rejected the defense argument that plaintiffs should be required to show continuing violations as a prerequisite for relief. And occasionally the courts have expressed their irritation at the failure of discharges and government enforcement agencies to resolve longstanding violations of law. In the Gwaltney of Smithfield case,[142] one of the few private enforcement suits that has reached the penalty stage, the court rejected the defendant's argument that the fine should be reduced because its compliance delays were caused by factors beyond its control:

> Contrary to Gwaltney's contention, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks--albeit not "imminent" ones--to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production.... [A]t the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharge into compliance with pollution standards.[143]

The court went on to impose a $1.2 million civil penalty on Gwaltney, most of which was designed to deter future violations.

While simple deterrence has generally prevailed in court, however, there are lingering problems which are partly doctrinal, partly managerial, and partly a matter of attitudes. They relate to the coordination of public and private enforcement, to the incentives that are created by and for private enforcement actions, and to the ligitimacy and accountability of private enforcers.

V. COORDINATING ENFORCEMENT

A. Consistency in Enforcement Policy

The goal of coordination in regulatory enforcement policy--that is, the notion that there should be a minimum of degree of consistency in enforcement policy, regardless of who is enforcing the law--starts from a simple premise. As a matter of basic fairness, like cases should be treated alike. If two permit violators are equally deserving of punishment, and one is heavily fined while the other is not penalized, the system has failed to achieve fairness between the parties.[144] Inconsistencies of this kind can also impair the efficiency and effectiveness of enforcement. If perceptions of unfairness become widespread, voluntary compliance may be undermined. Inconsistencies also invite litigation rather than settlement, with the resulting delays, costs, and risks of adverse precedent. In theory, then, enforcement should be consistent both at the level of policy, and at the level of implementation.[145]

Even without the complicating presence of private enforcement, however, consistency may be a frustratingly difficult goal to achieve. In a complex regulatory structure like the Clean Air or Clean Water Act, consistency implies codification or formal regularization of enforcement activity. However, enforcement policy is an intricate blend of moral judgments about what the defendant deserves, technical evaluations of the causes and consequences of particular violations, pragmatic assessments of what can be accomplished with available resources, legal opinions about the chances of winning and the precedential significance of various outcomes, and managerial judgments about the ways that various enforcement actions will affect norms and relationships in the relevant bureaucracies. Codifying enforcement policy in a way that reasonably accommodates these potentially conflicting demands is not impossible, and, as noted below, EPA has succeeded in codifying a substantial portion of its enforcement policy; but it is plainly not easy, or without costs.

Those costs include not only the intellectual and personnel resources needed to think through, describe and defend enforcement policy, but also some loss of flexibility and deterrent value. Like cases should be treated alike only if they really are "like cases"--that is, if they are indistinguishable with respect to all relevant variables. Like other rules, enforcement policies may omit some relevant factors and become overinclusive or underinclusive, thereby introducing a destructive element of rigidity where flexible discretion is needed. Moreover, to the extent that enforcement policy officially defines some offenses as so low in priority that they will escape sanctions altogether, codification lessens deterrence and undermines the applicable rules and standards. Notwithstanding these costs, some areas of enforcement policy still seem worth codifying. Especially when multiple entities inside and outside government are enforcing regulatory laws, codification is necessary to achieve fairness to the regulated, and to improve the quality and acceptability of enforcement policy. Moreover, as the following section indicates, the coordination device provided in the citizen suit statutes has largely failed to achieve its intended purpose. As a result, codification of policy has become the primary method for achieving some consistency in the enforcement process.

B. The Irrelevance of the Diligent Prosecution Exemption

The Clean Water Act, like most of the statutes containing citizen suit provisions, has two related mechanisms for coordinating public and private enforcement. Potential plaintiffs are required to give 60 days' notice to the EPA, the discharger, and the state where the alleged violation took place before filing an enforcement suit.[146] In addition, the private action is barred if one of the responsible government agencies is prosecuting a penalty action against the violator.[147] In theory, this system permits the government enforcers to take control of the matter by bringing their own action during the 60-day waiting period and relegating the private enforcer to intervention in the government's penalty suit.[148] As a practical matter, however, these provisions have been largely ineffectual in coordinating public and private enforcement; instead, they have provided a context within which a variety of informal coordination mechanisms and activities have evolved.

The principal reason why the notice-and-preclusion system has not functioned as originally intended is that 60 days is not long enough in the vast majority of cases to process a referral package from the EPA regional office through EPA headquarters and the Justice Department's Lands Division back to the local US Attorney who will actually file the case. EPA has made some attempts to streamline the case referral process in response to the pressures of citizen suits, but these changes do not affect the great majority of private enforcement cases against major polluters.[149] Thus, unless the government is on the verge of filing an action when the notice letter arrives, it is not likely to win the race to the courthouse if the plaintiff is intent on filing its complaint as soon as possible.

Usually, however, the plaintiff organizations have not rushed to file complaints as soon as the waiting period runs out. Instead, they have engaged in a variety of informal contacts with proposed defendants and government enforcers which provide at least the opportunity for coordinating effort and policy. Receipt of the notice letter is often the first contact between plaintiff organizations and potential defendants.[150] Since it is a formal document specifying the details of alleged violations and explicitly threatening suit, it evidently serves as a powerful prod to negotiations. Thus settlement talks between plaintiffs and defendants frequently follow the mailing of a notice letter. In the course of these negotiations, either the plaintiff or the defendant or both may be in contact with EPA and the state agency for information and opinion on the seriousness of the violation, the efficacy of proposed remedies, the reasons why the discharger has been unable to get in compliance, and the like.[151] In some instances, plaintiff organizations may delay filing a complaint in the hope or expectation that government enforcers will be able to get approval to bring their own action reasonably soon. Alternatively, the citizen groups may try to convince government to become a co-plaintiff or intervenor in the enforcement action. As noted below, it may be possible and desirable to systematize these informal contacts somewhat; but if these efforts do not produce a mutually satisfactory result, the plaintiffs have the leverage to move the controversy closer to a formal resolution by filing a complaint. The diligent prosecution bar seems to have little effect in these informal negotiations, since government usually cannot credibly threaten to invoke it.

A second problem with the diligent prosecution exemption is that the courts have not yet been able to generate a consistent and workable body of doctrine applying it. At the threshold, the issue occasionally arises as to whether notice requirements are jurisdictional prerequisites to a citizen suit which must be strictly observed, or instead are technicalities that may be waived by the court where there is substantial compliance or actual notice. The decisions have split on this issue, with the majority of opinions concluding that technical defects may be overlooked, so long as the defendants and responsible government agencies had actual notice that a citizen suit was being prepared.[152] One of the leading cases reaching the opposite result, Walls v. Waste Resource Corp.,[153] makes two plausible but empirically unsupported policy arguments for strict construction of the notice provisions. The first justification is the court's belief that the notice period is necessary "to give EPA an opportunity to resolve issues regarding the interpretation of complex environmental standards ... unhindered by the threat of an impending private lawsuit."[154] As previously noted, however, the 60-day period is far too short for the agency to complete even a routine case referral, much less resolve complex policy issues or statutory interpretations.

The second reason that the Walls court insisted on literal compliance with the notice provision was congressional intent to foster consent settlements during the 60-day waiting period: "Congress evidently believed that the filing of a private lawsuit hardens bargaining positions and leaves the Administrator with less room to maneuver."[155] However, if the 60 days is inadequate for government enforcers to make a decision on whether to sue, it is even less adequate to permit a decision on whether to settle the controversy. Even if the time were adequate, the defendant probably would have little incentive to settle with the government because, as described in the following paragraphs, the settlement would provide little protection against citizen suits. Thus, if the drafters did have the intent ascribed to them by the Walls court, they evidently did not foresee the ways that the notice-and-preclusion system would work in practice. Given the slow pace with which government makes and implements enforcement decisions, and the technical issues that have arisen over trivial notice defects,[156] it is difficult to conclude that this requirement has made any significant contribution to the coordination of public and private enforcement.

If the plaintiffs' notice is adequate, the next issue that frequently arises in private enforcement litigation is whether government's previous attempts to abate the pollution in question constitute diligent prosecution and therefore bar the suit. Since virtually every major pollution controversy comes to court with a long history of enforcement (or nonenforcement), defendants routinely raise the diligent prosecution defense, claiming that federal or state authorities have adequately dealt with the problems described in the complaint. These enforcement histories are highly variable, and the courts have little guidance from the statute and legislative history in trying to determine what sorts of prior enforcement can trigger the ban. Thus far, two issues have dominated litigation over the diligent prosecution exemption.

The first question is whether an administrative sanctioning process can ever be considered the equivalent of a court action for purposes of the diligent prosecution exemption. The citizen suit provisions generally state that private actions are barred only when the responsible government authorities are maintaining "a civil or criminal action in a court of the United States or a State to require compliance."[157] However, the major environmental statutes create a system of enforcement in which a substantial proportion of government attempts to induce compliance take place in administrative rather than judicial proceedings. Thus, EPA typically has the power to issue administrative orders against violators. These orders may carry sanctions for violations, as they do under the Clean Air Act; or they may function as a voluntary compliance agreement that cannot be separately enforced, as under the Clean Water Act.[158] In "delegated states" where primary enforcement responsibility has been taken over by state agencies, the range of possible sanctions and procedures is even greater.

The courts have split on the question of whether an administrative enforcement process can ever trigger the diligent prosecution exemption. The Third Circuit considered this issue first in an early Clean Air Act suit, Baughman v. Bradford Coal Co.,[159] and concluded that an administrative tribunal could be considered the functional equivalent of a court, if it had decisionmaking procedures and remedial powers comparable to those possessed by the federal courts. However, the Second Circuit reached the opposite conclusion in the recent Conrail litigation, citing the plain meaning of the statute.[160] In practice these divergent approaches may make little difference, since courts applying the Baughman test have generally concluded that administrative proceedings are deficient either in sanctions, or in procedural rights like intervention, or both.[161] However, the Baughman approach does require more data and analysis, and as a result may increase costs and delays.

Even if the government enforcement action meets the "court proceeding" test, it still must be "diligent" in order to bar a citizen suit. This is a difficult standard for the courts to apply, since neither the statutes, nor the legislative history, nor analogous areas of law provide much guidance in determining when environmental enforcement is sufficiently diligent. Apart from a few easy cases, like the situation where a citizen group was able to show that a government enforcement order violated the Clean Water Act,[162] it is not clear that the courts will be able to develop judicially manageable standards for measuring diligence.[163] As the Supreme Court recently noted in Heckler v. Chaney, prosecutorial discretion has generally been immune from judicial review because "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[164] The diligence test effectively invites the courts to enter the thicket that the Supreme Court was careful to avoid in Chaney.[165]

As presently applied, then, the statutory notice-and-preclusion system accomplishes little in the way of coordination, at some cost in increased litigation and uncertainty of result. One possible response is to lengthen the waiting period so that government would have a more realistic opportunity to make and execute its own enforcement decisions after receiving a citizen notice letter. The 1984 amendments to the Resource Conservation and Recovery Act take a step in this direction by extending the waiting period between notice and suit to 90 days.[166] From the government's perspective, this might be better but still not adequate; it is not clear where the line between diligent and dilatory should be drawn, or how the definition of reasonable diligence might vary among defendants, regulatory programs, and types of violations. More fundamentally, it appears that framing the issue in terms of the government's diligence may ignore some of the most important factors relating to the relationship between public and private enforcement.

Diligence, at least in its common usage, seems premised on a simple theory of deterrence: the diligent prosecutor will bring the largest number of cases possible with available resources, against the most deserving violators, seeking the most stringent penalties. But ideally it is less important to know how hard the prosecutor is trying, than it would be to learn how effective he is. The ultimate question is how the particular citizen suit, and others like it, will affect compliance among the regulated community. Deterrence may not be the only or the best route to that result. According to some behavioral theories of regulatory enforcement,[167] private suits that contradict prior governmental acceptance of the firm's pollution abatement efforts could undermine the authority and credibility of the company's engineers and managers who are responsible for environmental controls. In the long run, this could diminish the regulated industry's willingness and ability to reduce environmental harm.

A different approach which might make it easier to address these concerns is suggested by the attempts of some defendants in citizen suits to "put the whole picture" before the court--that is, to present information showing that there were excuses for the violations that did occur, that the government took reasonable enforcement action in light of the circumstances, or that any resulting pollution did not cause significant harm to public health or the environment. There are a variety of doctrinal bases that defendants can use to make this kind of presentation,[168] but the one that seems most relevant for present purposes is the effort to have government enforcers participate in citizen suits.

Government agencies may be brought into the private suit as intervenors, or as witnesses, or as *amici curiae*; their participation may be either voluntary or coerced.[169] Whatever the basis on which governmental enforcers participate, they have potentially useful information to present to the court regarding the compliance history of the facility in question: how and why the violations occurred, their impact on other uses of the waterway, the efforts of the defendant to achieve compliance, the rationale for the various enforcement actions that the agency has taken, and the practicality of various remedial alternatives that the court may be considering. Even if this sort of information would not justify barring the citizen suit, it seems highly relevant to one of the most difficult aspects of citizen suits, the imposition of penalties.

However, EPA and the delegated state agencies have generally not taken a very active part in private enforcement litigation, and the courts usually have not compelled them to do so. There are probably several reasons for this agency reluctance to intervene, the most pressing being the lack of resources that keeps them from bringing their own action against this violator in the first place.[170] Diverting agency engineers, scientists, and lawyers to private enforcement actions takes them away from working on the cases that the agency considers higher priority.

There is also a loss of control in the case, as government enforcers may get put in the position of endorsing a remedy that they had little responsibility for devising. That risks not only bad precedents, but also political attacks for accepting an inadequate settlement or decree.

If it is impracticable for the enforcement agencies to participate routinely in citizen suits, then the only other avenue for communicating enforcement policy and compliance history to courts and litigants is some form of codification. As the following sections note, codification generally grows out of the agencies' own management needs and practices; as a result, it is necessary to review briefly some of the ways in which EPA attempts to manage enforcement.

C. EPA's Managerial Initiatives for Coordination

In considering the relationship between public and private enforcement of environmental laws, it is important to recognize that EPA would have a difficult problem of coordination even if the citizen suit provisions had never been enacted. The structure of the statutes it administers, and the organizational setting in which the agency operates, makes it difficult for EPA to achieve consistency in its enforcement activities. The Clean Water and Clean Air Acts, like most of the federal environmental statutes, incorporate a system of "cooperative federalism" under which EPA and the states share the responsibility for achieving compliance with regulatory requirements.[171] While they share the same general goals as EPA, however, the state programs may have different types of personnel, different philosophies of enforcement, and different political pressures.[172] Thus, even though EPA may possess the formal legal power both to override particular enforcement decisions and to revoke the delegations of state enforcement authority, the practical need to keep the states functioning as effective enforcement partners can force EPA to tolerate some departures from federal enforcement policy.[173]

Apart from this need to accommodate state enforcement agencies, EPA has a difficult time setting and communicating its own enforcement policy. The agency has become a large and complex bureaucracy, and multiple offices with differing perspectives may have a stake in enforcement decisions. Within EPA headquarters, program offices like Air or Water may have different ideas about proper enforcement policy from the Office of Enforcement and Compliance Monitoring or the Office of Policy, Planning and Evaluation. The agency's ten regional offices, staffed by officials who deal with different sets of actors and problems on a daily basis, may also have a very different approach to enforcement from their Washington counterparts; and though they are formally subject to supervision and direction from headquarters, the regions have traditionally enjoyed substantial autonomy.

In practice, these problems of coordination within and across levels of government have several implications for the integration of citizen suits into existing systems of enforcement. First, it is important to remember that coordination within government if far from perfect, and that consistency is often more of a goal than a reality. Thus, any observed difficulties that private enforcers have in coordinating their activities should not be compared with hypothetically perfect government coordination. In practice, the private enforcers have some advantages and some disadvantages in developing coherent policy, when compared to their government counterparts. A second implication is that the presence of private enforcers gives EPA's management efforts to achieve internal consistency a more pubic dimension than they would otherwise have. Parties engaged in private enforcement litigation have a powerful incentive to uncover all of the relevant facts about agency enforcement policy and, wherever applicable, to use the agency's policy in support of their own positions. In this respect, citizen suits are an additional pressure for the agency to engage in dialog with its constituencies over enforcement policy, and to codify clearly established enforcement practices. Finally, EPA's experience in trying to provide enforcement guidance and monitor performance indicates that the broad concept of "enforcement policy" needs to be broken down into its constituent parts. When examined closely, regulatory enforcement policy is comprised of many decisions and practices. The practicability and desirability of codifying these practices into policy seems likely to differ sharply from one area to another.

Some of the difficulties--and opportunities--of codifying enforcement policy are perhaps best illustrated by examining one concerted effort that EPA has made to achieve consistency in enforcement, the concept of "significant noncompliance" under the Clean Water Act. By the mid-1970s, when EPA had completed the initial task of issuing discharge permits as required by the 1972 statutory amendments, the agency began to turn its attention to the task of achieving compliance with those permits. As one internal document put it, "With this shift in emphasis has come the increased awareness that the program will be effective only to the extent that EPA and the States are able to identify instances of non-compliance and take appropriate and timely actions with uniformity and consistency."[174] Several management tools were used to achieve that goal. An Enforcement Management System Guide set forth general principles that EPA regional offices and delegated states should follow in order to set priorities and achieve consistent, effective abatement of violations.[175] The Guide incorporated Technical Review Criteria which instructed low-level clerical personnel when to refer dischargers' monitoring reports to professional staff for enforcement action,[176] and an Enforcement Response guide which suggested appropriate actions to resolve different types of violations. Thus, minor reporting deficiencies might be handled through a warning letter, if they were "isolated or infrequent"; if they continued, however, an Administrative Order whould be sought.[177] At about the same time, EPA began developing a computerized Permit Compliance System that would receive and generate reports on noncomplying dischargers.

Throughout these efforts to regularize and formalize its management of the enforcement process, EPA was careful to emphasize that its objective was to utilize limited resources effectively and rationalize management rather than to set substantive policy that would define some violations as serious and others as trivial.[178] At the next stage of management initiative, however, the line became blurred, and the agency lost some credibility as a result. In the early 1980s, EPA began to develop the concept of "significant noncompliance" as a tool for setting priorities and measuring the performance of field-level management. Conceptually, it was a logical outgrowth of the Technical Review Criteria, the Enforcement Response Guide, and the reporting requirements that fed into the Permit Compliance System computers. The idea was to set quantitative thresholds to distinguish serious from less serious violations. Thus, a discharger who exceeded a permit parameter by more than x percent, or who violated limits more than y times in any calendar quarter, would be flagged for special attention on the quarterly noncompliance reports.

Although it made some sense as a management tool, "significant noncompliance" encountered a number of problems. The phrase itself was probably an unhappy choice, because it implied that violations below the action thresholds were "insignificant," and therefore presumably not worthy of enforcement response. Even some of the agency staff people who were familiar with the rationale for significant noncompliance had doubts that the numerical thresholds were meaningful, and their skepticism was not decreased by the fact that the "re-definition" of noncompliance seemed to increase statistical measures of industry compliance without altering polluter behavior.[179] Further suspicions were aroused because the significant noncompliance standard was put into use during the stormy tenure of Anne Gorsuch Burford as EPA Administrator, when environmental groups and some of the agency's own staff were complaining publicly that EPA had become soft on polluters. Finally, EPA's Inspector General fed suspicion of significant noncompliance by formally reprimanding the agency for failing to publish the standard in the Federal Register.[180]

After this inauspicious beginning, EPA published a proposed rule on quarterly noncompliance reporting which incorporated a modified version of the significant noncompliance standard, but carefully omitted any mention of that term.[181] This time, the notice explicitly pointed out that "the proposal effects [*sic*] only reporting requirements. The proposal has no impact upon what is considered a violation, or on whether or what kind of enforcement action will be taken in a given case."[182] As several commenters pointed out,[183] however, the statement was not quite true, due to the presence of citizen enforcers. The groups bringing private enforcement actions were using the quarterly noncompliance reports to flag the most serious violators for closer scrutiny; consequently, EPA's reporting requirements could greatly affect the chances that a noncomplying firm would find itself the target of a private enforcement action.

Moreover, even before the reporting rule became final in August of 1985,[184] EPA had adopted its definition as part of more detailed policy guidance to delegated states and regional offices. In June of 1984, EPA issued its *Policy Framework for State/Federal Enforcement Agreements*, which included as one of its primary criteria a requirement for "timely and appropriate enforcement response" to violations.[185] The policy statement noted resource problems both within EPA and in the states, but directed that "at a minimum, the focus should be on the greatest problems, *i.e.*, the significant non-compliers."[186] The Assistant Administrator for Water followed up with a directive making clear that "any noncompliance required to be reported in the [quarterly noncompliance report] ... is considered 'significant noncompliance'"[187] and should receive highest priority.[188] Thus, by a rather circuitous route, EPA's significant noncompliance regulations had become a key component not only of the agency's attempts to manage its own staff and oversee the delegated states, but also of the attempts by both public and private enforcers to establish litigation priorities. Moreover, despite EPA's disclaimers, the rules may also have a substantive effect in defining the kinds of violations that will be subject to any sanctions at all,[189] given the relatively modest levels of resources currently available to enforcement agencies and to the groups bringing citizen suits.

Over time, the approach to codification of enforcement policy used in the significant noncompliance rule may become more common, since there are a number of incentives pushing EPA and other federal agencies in that direction. Internally, a regulatory program like the Clean Water Act must have some formal standards and performance measures, because it encompasses thousands or even hundreds of thousands of individual sources throughout the country and relies on a decentralized system of regional offices and state agencies to take initial enforcement actions. Norms and expectations must be communicated to field-level enforcers, and measures of productivity must flow back to headquarters so that performance can be monitored. This is likely to work best when enforcement policies and priorities are clearly, explicitly stated. Thus the demands of good management can exert a powerful pull toward rationalization of enforcement policy. In recent years, this trend has been strengthened by the politicizing of enforcement at EPA and other agencies. Basic conflicts over the preferred strategies for enforcing environmental laws have made enforcement issues highly visible, and potentially damaging to the agency. Today, enforcement officials can expect to have congressional committees, the General Accounting Office, and a variety of media representatives and constituency groups routinely monitoring their enforcement activities. One way to survive this close scrutiny is to have a defensible set of enforcement standards and priorities, which may be used to justify particular actions--or inactions.

The courts also exert some pressure for codification of enforcement policy, since agency rules or policy statements are likely to gain more judicial deference than ad hoc justifications for a particular decision. With the spread of citizen suits, judicial reaction becomes a more prominent factor, because the agency does not control the litigation where its policy comes into question--and, indeed, may not even be a participant. As a result, ambiguities or omissions in agency enforcement policy may be resolved by courts and litigants who have no real understanding of what the particular interpretation may do to the agency's program. Here, also, the agency's advance codification may help to protect agency autonomy by forestalling destructive or uninformed judicial decisions.

A related advantage is that codification of enforcement policy can guide the activities of private enforcers and help coordinate them with government's efforts. To be sure, private enforcers are not necessarily bound by government enforcement policies in any legal sense;[190] but in practice the major groups bringing the actions have generally followed EPA enforcement guidelines. The significant noncompliers identified on EPA's quarterly noncompliance reports have been the primary targets of private enforcement, and the citizen suit plaintiffs have generally purported to apply EPA's penalty policy when calculating proposed fines (though admittedly with very different results). The more detailed and accessible agency policy articulations become, the more likely it will be that private enforcement activity will remain consistent with public enforcement.

The need for consistency may become greater in the future, because thusfar the private enforcement effort has been carried out by a relatively small group of private attorneys who have established a network of communication and cooperation. In addition, they have had the luxury of choosing a few of the most frequent or most prolonged violators in most of the regions where they have been operating.[191] If citizen suits become an established field of litigation, however, and a larger and more diverse group of lawyers begins to look at less egregious violations, the inconsistency problems could become serious. The Administrative Conference took note of this possibility by recommending that EPA give high priority to articulating its enforcement policies in three areas: selecting cases for enforcement, calculating penalties, and settling contested cases.[192]

Whatever the impetus to codify, once enforcement policy has been articulated, it will become a matter of public record sooner or later. If so, there may be advantages to getting public input on the content of that policy, as EPA rather reluctantly did with the significant noncompliance rule. Public participation has the advantages of uncovering technical problems in proposed standards before they are implemented and, perhaps more importantly, of improving the dialog between the agency and its constituency groups. The significant noncompliance rulemaking probably contributed to better understanding of agency enforcement policy among regulated firms and environmental groups, and some technical changes in the draft rule were made in response to public comments. The notice-and-comment procedure does take longer to complete, and rules or policies that have gone through this process may be more resistant to change than those issued unilaterally;[193] but at this point in the history of environmental regulation, stability and consistency may be more important ingredients of sound enforcement policy than flexibility and individualization. Pollution control technologies generally require substantial time and money to put into place, and continuing effort to operate and maintain. Sudden changes or inconsistencies in enforcement policy may undercut expectations among the regulated, as well as undermine voluntary compliance.

Thus, Environmental Protection Agency has begun to codify major portions of its enforcement policy, particularly in the areas of case selection, penalty assessment, and settlement criteria. The pressures and incentives to continue this process seem substantial and, according to some of the agency's internal evaluations,[194] codification seems to make a complex system of shared enforcement responsibility function more smoothly. But it is important to note that broad areas of discretion still remain. Individualized judgments still need to be made regarding factors like the legal and factual strength of the particular case, its potential significance as precedent, and the extent to which the violator deserves harsh punishment because of intent, past failures to comply, and the like. Even where the agency has codified its criteria, the application of established standards may confer considerable discretion on field-level officials. And, finally, EPA has important discretion to exercise at the level of framing definitions of compliance and establishing reporting requirements to capture evidence of violations. As described in the following section, this discretion gives EPA a large measure of effective control over the role that private enforcers can play in a particular regulatory program.

D. Information as a Means of Controlling Enforcement Policy.

Litigation is fundamentally a process of gathering, presenting, and evaluating information, and easy access to accurate information is a prerequisite to bringing successful citizen suits. One of the primary reasons that most of the private enforcement activity has centered on the Clean Water Act are the systems of monitoring, self-reporting, and data processing developed under that statute.

The self-monitoring system is built into the statute, which requires each discharger to obtain a permit and provides sanctions for failure to submit periodic compliance reports.[195] While monitoring for toxic pollutants may be difficult, the "conventional pollutant" parameters, such as biological oxygen demand or pH, can be monitored routinely and inexpensively. Thus, the permitting agency can reasonably require dischargers to report monthly or weekly average discharges of these pollutants, in addition to daily maximums. The agency's computerized permit compliance system collects information from permittees' periodic discharge monitoring reports (DMRs) and compares it to their permit limits. This makes it possible to generate the quarterly noncompliance reports identifying significant violators. As previously noted, these QNCRs are widely used both for internal program evaluation, and for case selection by many of the citizen suit plaintiffs.

Scanning the QNCRs to identify persistent permit violators is only the first step in case screening for most of the plaintiff organizations. To develop a full understanding of the violations, and to document them for possible courtroom use, it is necessary to get into the detailed paper records, which usually means spending an extended period of time in the state agency or EPA regional office tracking down and copying or summarizing files. This is commonly regarded as grubby, tedious work, a far cry from the fancy computer systems at EPA headquarters in Washington:

> [Y]ou have to go look at the permit file; there may be a separate administrative compliance file; there could be a separate enforcement file. There's sometimes four and five files in five or six different buildings, and people are hanging on to them, and have them on their desks for a variety of reasons, or they don't want to show you [them to] because they think it's confidential, even though it's not. And it's a hassle .... It eats your time, you're really spinning

> your wheels, and usually you're under the gun to whoever is paying the toll for this to produce results as quickly as possible.

Plaintiff groups and their counsel have developed a variety of methods for completing this initial investigative phase, ranging from having lawyers do most of the work to training relatively inexpensive personnel like college students to do the detailed file reading under expert supervision. However it is accomplished, file review is still likely to be a slow and rather expensive process; $15,000 would probably be a very conservative estimate of the minimum cost of mounting a modest file review campaign in a large state.

In some of the delegated states where the primary files are kept by state agencies rather than EPA, recordkeeping practices can reportedly become rather slipshod.[196] One plaintiffs' lawyer noted the "huge gaps" they had found in the records in one delegated state: "There will be months, periods of time, where you won't know whether there is a violation or not." Another recounted the misfortune of trying to review the permit files in a different state when the agency was in the process of reorganizing its recordkeeping system:

> [T]he attempt was to decentralize decisionmaking in the agency back to the field offices. And part of the decentralization was putting the files on trucks and sending them out to the eight or nine regional offices, and we have had it happen just in the last two months three or four times where you literally can't find a file. [Headquarters] claims it has been shipped off to [a regional] office; [the region] claims they never got it, or they haven't opened that box yet. ... So whatwe did after our QNCR review and our first cut was, I had a summer legal intern ... [go] to the regional offices and to [headquarters] to review files in both places.

Sloppy agency recordkeeping can both increase the cost of researching a citizen suit, and perhaps also cause the plaintiff organizations to bring some bad cases.

Through its regulations on monitoring, recordkeeping, and reporting, as well as through its quality control over its own records and those of the delegated states, EPA still retains a substantial measure of practical control over private enforcement.[197] At the extremes, the agency could by its inaction or tacit approval of sloppiness let the recordkeeping systems degenerate to the point where plaintiffs would be unable to identify violators or generate a prima facie case from official records. This is reportedly the situation in some of the newer programs like the Resource Conservation and Recovery Act, where recordkeeping systems are under development and have not yet reached the level of sophistication and reliability achieved in the Water program.[198] As a result, groups contemplating citizen suits against noncomplying toxic dumpsites face formidable practical and technical obstacles, and few private enforcement cases have been brought under RCRA.

At the other extreme, EPA could mount a major effort to upgrade monitoring, reporting, and recordkeeping systems in all of the media programs that have citizen suit provisions, for the purpose of facilitating private enforcement. According to Professor John Coffee, something similar to this has happened in the field of securities law enforcement, where the SEC is willing to accept very low or "painless" settlements in its consent decrees because entry of the decree operates as a "signal to the plaintiff's bar that an attractive [class action damages] case is available."[199] More generally, he argues that "it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics."[200]

EPA's handling of information systems has fallen somewhere between these extremes. It has generally made most of relevant information it has readily available on request. EPA has also attempted to upgrade its own information systems, although most of the emphasis seems to be on building improved management tools to oversee and measure aggregate performance rather than on designing systems that would facilitate the selection and proof of individual cases. If EPA is serious about cooperating with citizen group plaintiffs, it could probably make major gains in private enforcement through upgrading monitoring and reporting in programs like RCRA.[201] It might also make some modest improvements in Clean Water enforcement through further refinement of information systems, particularly in the area of quality control over state recordkeeping. One apparent obstacle to this is OMB's reputedly stringent review of reporting requirements under the Paperwork Reduction Act. In undertaking such reviews, OMB should at least be alert to the possibility that better reporting may make it possible to achieve a given level of enforcement at significantly lower cost to the federal treasury if private enforcers are able to take over part of the workload.[202]

Beyond case selection and development of evidence, citizen suit plaintiffs rely on agency records to assure that there will not be a protracted factual trial about whether violations actually occurred. Ideally, the plaintiffs hope to win a motion for summary judgment on liability and proceed quickly to issues of penalty and other relief. A number of cases so far have unfolded in this fashion, but defendants have begun trying to open up the question of whether the monitoring data in the DMRs is accurate. This is tactically rather awkward, since it essentially requires them to attack the reliability of their own test data, submitted to the agency in the normal course of business subject to a corporate officer's certificate of accuracy.[203] A defense lawyer explained the basis for this line of attack as follows:

> One situation is this: you have a company which just plain screwed up--they tested the wrong thing, they used the wrong methodology, whatever ... [T]hose reports, true as they were at the time they put them in, reflect nothing ...; they're just mistaken. ... The other situation is this: You have accuracy levels for various analytical techniques. For example, you have "one" ... as your limit in your permit. And the analytical test you must employ -- and that's specified in your permit, you don't have any choice about this, ... you must employ this particular analytical method using a particular type of instrument -- says that the accuracy for testing that parameter at the level is plus or minus point two. If you get a reading of one, or if one is your limit, there is still an argument, I believe, that anything that falls between point eight and one point two, because of the accuracy of the underlying equipment, is still equivalent to one.

So far the courts have not accepted this argument,[204] but it seems likely that defense lawyers will keep trying to raise it.

This seemingly arcane technical question of monitoring accuracy has some significant practical implications for the use of citizen suits, at least for groups employing private lawyers to bring them. One of the most attractive features of Clean Water Act suits has been the high likelihood--indeed, the virtual certainty -- of winning on the merits if the courts treat the DMRs as admissions by the defendants. As one experienced plaintiffs' lawyer put it, "The minute you say that you can lose a very substantial amount of cases on the merits after putting in very substantial resources, obviously the desire of more private lawyers like myself to take those kinds of risks changes enormously. ... [I]f you win fifty percent of your cases, eighty dollars an hour is not worth a damn." If the defendants succeeded in opening up the validity of the DMR's to trial on the merits, this would most likely involve protracted hearings with extensive testimony from statisticians, engineers, and other expensive experts.[205] Even with the prospect of fee and cost recovery if plaintiffs ultimately prevail, it seems clear that the greater time and "front money" investment, longer delay before recovering, and increased risk would deter some plaintiffs and plaintiffs' lawyers from bringing the actions. There would also be comparable problems for EPA and state enforcement programs. Clearly, the data reliability issue is one that EPA needs to keep in sight as it drafts permits for previously unregulated pollutants and develops monitoring and reporting requirements for other media programs. As a separate enforcement issus, the agency should also be alert to the possibility that the private enforcers' growing use of DMRs is creating an incentive for noncomplying dischargers to overlook filing requirements, or even "fudge" the data.

VI. REMEDIES AND INCENTIVES

Ultimately, the purpose of the citizen suit provisions is to change behavior by changing incentives: the incentives of dischargers to comply with their permits; the incentives of private parties to bring actions against noncomplying dischargers and nonenforcing agencies; and the incentives of agencies to enforce the environmental laws more effectively. At least from the discharger's point of view, the most potent incentive is the remedy imposed by a court or agreed to in settlement talks. Remedies have also proved to be the most serious sticking point in the progress of cases brought under the Clean Water Act, and in the evolution of workable ongoing relationships between plaintiff and defendant organizations.

As noted above, the remedial provisions of the Water Act differ from those in most of the other statutes administered by EPA in two significant respects: private enforcers can seek money penalties as well as injunctive relief from violators, whereas most citizen suit statutes allow only injunctions in private enforcement suits; and the agency lacks authority under the CWA to impose any administrative sanctions on a party violating a permit or a statutory duty. The statutory penalty maximum is $10,000 per day of violation,[206] and either EPA or the citizen suit plaintiff can -- and sometimes does -- ask the courts to impose penalties based on the theoretical maximum calculation of days in violation times ten thousand dollars. Legally, there are very few constraints on penalty calculations. One of the few cases discussing CWA penalty assessments, Detrex Chemical,[207] held that a discharger could not be fined more than $10,000 for any given day, regardless of the number of permit limitations violated during that day. But major permit violations involve chronic problems rather than one-shot failures, and courts have generally interpreted statues of limitation to give private enforcers to cumulate violations over at least the five-year limitations period applicable to government enforcement.[208] Thus, it is relatively easy for citizen suit plaintiffs to total up maximum fines running well into the six or seven figure range.

With few legal constraints, the dispute between dischargers and private enforcers has centered on EPA's administrative practice in calculating civil penalties under the CWA. The agency has promulgated some general guidelines for penalty calculation, first in 1980 and then in revised form in 1984.[209] Both EPA and the leading citizen suit plaintiff organizations purport to be applying this policy, but the figures they generate from it tend to be markedly different. The citizen groups' damage figures reportedly run ten to a hundred times higher than the amounts EPA customarily gets in settled cases,[210] and as might be expected this discrepancy has generated considerable resentment from citizen suit defendants. One defense lawyer who had handled several private enforcement cases described client reactions in the following terms:

> [S]ometimes that number [of total penalties and accrued fees and costs] is astronomical; and that alone ... says, "Why bother to talk? We can litigate an awful lot for the kind of money those people want. And there's a chance we might win." ... [A]gencies have generally taken the position "Let's get the problem taken care of. You've been naughty, but put the technology in. ... [A]nd we're going to get you [with a penalty] as well, just to let you know we're serious." And they may go anywhere from five hundred dollars to ten thousand; it's not likely to be anything in the range of even five figures, [let alone] six figures. The focus of the agency is to clean up the problem. And they'll even suspend part of the penalty to give you an additional incentive to comply with a compliance schedule. ... [T]o some degree [the companies] have no problem with this philosophically. They realize they've got to comply; at least the ones we've dealt with have not been bad guys. They may have been screwed up, they may have been taken by a vendor, they've got all sorts of problems, but they're not intentionally flouting the environmental laws. ... And this [penalty calculation by private enforcers], which is just a cash register approach, even though plaintiffs don't intend to end up [in a final negotiated settlement] where they start out, ... they start out so terribly, unrealistically high that the defendants just say, "Why talk?"

While the spokespersons for plaintiff organizations would take sharp issues with the "cash register" characterization and the implication that their penalty demands are unreasonable, many would agree that the discrepancy between EPA's and the private enforcers' penalty calculations is currently the primary deterrent to settlement.[211] To understand how such wildly divergent results are being produced from the same documents, it is necessary to take a closer look at EPA's penalty policy.

The 1984 penalty policy, like its predecessor, draws heaviliy on the concept of "economic law enforcement" that became widespread in the 1970s -- the idea that penalties should be calculated with a view toward depriving the violator of any financial gains he might have realized from noncompliance.[212] Thus, the official penalty calculus begins with two primary factors, an economic benefit component and a gravity component. These are to be calculated separately, added together, and then adjusted to reflect a vareity of considerations relating to the blameworthiness of the violator and the strength of the agency's case.

The economic benefit component is to include the estimated benefits to the defendants from delayed costs (such as purchasing treatment equipment), avoided costs (such as operating and maintenance expenditures that would have been incurred if the treatment system had been installed at the proper time), and competitive advantage.[213] Even if this amount could be perfectly calculated, however, a fine which simply removed economic benefits would put the violator in the same position as if it had originally complied. To deter violations, additional sanctions must be added; and so the penalty policy adds a gravity component reflecting such factors as the actual or potential harm to the environment from the violation, the importance of the violated provision to the statutory scheme, the amount needed to achieve an appropriate impact, and other program-specific factors.[214]

The sum of the economic benefit and gravity components, called the "preliminary deterrence amount," is then adjusted to reflect a variety of factors such as the discharger's willfullness or negligence, its degree of cooperation or recalcitrance with enforcers, its ability to pay, its history of noncompliance, and the strength of the agency's case.[215] To promote settlement, EPA is willing to reduce the gravity component if the violator promptly began corrective measures before litigation.[216] The agency may also accept additional environmental cleanup in lieu of part of the penalty.[217] On the other hand, EPA is prepared to raise the gravity component if the defendent delays compliance during settlement negotiations.

As this summary suggests, application of the penalty policy is at least as much an art as a science. Even the relatively precise terms of the calculus, such as economic benefit, may be elusive. The capital cost of a treatment system that should have been purchased five years ago may be possible to reconstruct with some precision, but how much would it have cost the company to operate and maintain that system? Are there current, reliable data available on average "O & M" costs in this industry, and the amount of variance across firms? Should one assume that this firm would have average, high, or low O & M costs? How would the installation of the treatment system have affected production? Tax liabilities? What interest rate (if any) should be applied to determine the net present value of the funds made available by virtue of noncompliance? EPA has developed "rule of thumb" methods for estimating these values, and more guidance is promised in the near future;[218] but for the current wave of citizen suits that are pending in various stages of completion, there is ample room for disagreement.[219] A former agency staff attorney now involved in citizen suits remarked, "It was very common for the case engineer to pre-decide how severe a penalty he wanted to see in a particular case and then raise [or] lower the capital and O & M costs to obtain the desired result, without having to debate the gravity of the harm or other factors. I personally have seen penalty calculations be reduced by 50% or more in this manner."

The scope of discretion, and thus the chance for differences of opinion, is much greater in other parts of the penalty calculus. The gravity component of the preliminary deterrence amount, for example, includes risk or actual harm resulting from the violation. The Penalty Policy seeks to give content to that concept by specifiying some subsidiary factors that go into the harm assessment, including amount of pollutant, duration of violation, toxicity of pollutant, and sensitivity of the environment where the discharge takes place.[220] However, most of these factors have very little, if any precise content. The duration-of-violation guidance, for example, simply says: "In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm."[221] A few citizen suit plaintiffs have filled these gaps with more detailed guidance of their own.[222]

Through these discretionary gaps in the penalty policy, users are able to inject their own enforcement philosophies. The citizen suit plaintiffs, in accord with their predominant emphasis on the importance of deterrence, generally interpret the penalty policy to achieve that goal. The state agencies and the regulated firms assume a much smaller role for deterrence in practice. EPA has shifted its official position on the role of deterrence, especially during the Gorsuch administration. Its current pronouncements like the 1984 penalty policy give considerable emphasis to the importance of deterring violations, but EPA's actual behavior in seeking and obtaining penalties has on the whole probably fallen much closer to the state agencies' than to the citizen suit plaintiffs'. To use the behavioral terms previously mentioned, these latter groups seem to be acting on the assumption that most of the violators either are good citizens who may need a bit more time and persuasion to clean up their effluents, or they are organizationally incompetent firms who need the carrots of advice and assistance rather than the sticks of civil penalties to get into compliance. The plaintiffs, by contrast, tend to assume that beneath every professed incompetent or good citizen lurks an amoral calculator, its eyes firmly fixed on the bottom line. One experienced environmental lawyer reflected this difference when describing negotiations with noncomplying firms in some of the recent citizen suits:

> They say, "In 1979, we did this, in 1980 we did that, in 1981 we did this." And I [say] to them, "Look, if you were losing money you wouldn't be operating at this level. What you're doing, I know, you are kind of trying. But failing doesn't hurt, [does] it? It didn't hurt a bit to fail."

Thus, from the plaintiffs' perspective, the primary objective of the penalty policy should be to make pollution abatement failures hurt enough to force widespread compliance.

With the limited data currently available, it is not possible to make an indisputable empirical case for either of these views of environmental compliance. Past efforts by the public-sector enforcers of the Clean Water Act seem to have left a substantial amount of noncompliance uncorrected. But it does not necessarily follow that a strict deterrence-oriented penal enforcement strategy would have produced much better results. There are strong theoretical and practical reasons why cooperative strategies can be preferable to strict deterrence.[223] At the same time, total reliance on voluntarism can be an open invitation to procrastination, manipulation, and backsliding. Thus a mixed enforcement strategy combining elements of cooperation and coercion is probably needed. The trick is to know how much carrot and how much stick is likely to work in a particular context. The appropriate proportion of these components is likely to vary both from one polluter to another and from one regulatory area to another, and it may also shift over time. Considerable additional research would be needed to make confident judgments about the ideal mix of "toughness" and "reasonableness" in enforcement of the Clean Water Act and other media statutes containing citizen suit provisions.

Apart from the ultimate efficacy of enforcement strategies, it seems clear that the different interpretations of the penalty policy by EPA and the private enforcers have some unfortunate consequences. The actual and perceived fairness of the enforcement system will suffer if the size of the penalty imposed varies by an order or magnitude or more, depending upon the largely fortuitious circumstance of whether a private or public enforcer reaches the courthouse first. The discrepancy also invites a variety of unseemly behaviors, if not outright collusion, if enforcement targets see a great advantage in being sued by a particular enforcer. Violators may ask sympathetic agency personnel to impose token money penalties or lenient consent orders on them to forstall private penalty actions. Or they could borrow a page from the environmental organizations' book and try to find a friendly local plaintiff willing to bring a relatively toothless private enforcement action, then argue that subsequent actions relating to the same violations are barred by the doctrines of res judicata and collateral estoppel.

There are two related ways in which this gap could be closed and an authoritative interpretation of environmental penalty policy developed. As contested citizen suits are resolved in the courts, the federal judiciary will inevitably have to give more detailed content to the generalities of EPA's penalty policy. If the first reported decision to reach the penalty stage is any indication, the defendants may find themselves facing much stiffer penalties in private actions than EPA or the state agencies ever assessed for comparable violations. In _Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd._,[224] the district court applied EPA's penalty policy to produce a $2.3 million penalty for longstanding violations of a Clean Water Act permit. Less than one percent of this amount represents the supposed economic benefit to the defendant from delaying compliance; most of the total reflects the court's assessment of environmental harm and the needs of deterrence. The Gwaltney decision is currently on appeal, and ultimately it may turn out to be aberrational; but in the long run, one effect of private enforcement litigation may be to shift the penalty horizon sharply upward for both public and private enforcers. As the total amounts and standards for calculating penalties become more clearly established, more settlements will probably be negotiated in private enforcement cases.

Litigation is a relatively slow and uncertain way to refine the penalty calculus. The easier route toward greater consistency in penalty policy is EPA's elaboration of its guidance for calculating penalties and settling cases. The process of better defining penalty standards gained momentum under the Ruckelshaus administration and is apparently continuing under the agency's current leadership. Following and refining the Air Act's penalty model, the penalty policies for individual regulatory programs like Air and Water will reportedly provide more detailed information about how and why the various elements are to be estimated, give more "rules of thumb" for generating ballpark figures quickly, and create new computer programs to perform the whole operation automatically when the appropriate figures are fed in. The agency has also announced plans to incorporate information from all judicial enforcement actions into a computerized data base. Settlement policy for government litigation is being codified, especially in the hazardous waste field.[225] By rapidly developing these systems, and making explanatory information easily available, EPA can probably go a long way toward improving the fairness and consistency of penalties for violations of the environmental laws.

The appropriate amount of penalties for violations is not the only factor creating friction between plaintiffs and defendants in the current wave of Clean Water Act citizen suits. There is also an ongoing debate about where those penalties should go. As the legislative history indicates, the drafters of the Water Act's citizen suit provision contemplated that any penalties recovered after final decision in a private enforcement action would go to the Federal Treasury.[226] However, there was apparently little thought given before the current wave of suits as to what would happen when a controversy was settled rather than decided by the court. Usually such settlement agreements are incorporated into a judicial decree to assure enforceability and protection of the parties, but courts traditionally give settling parties considerable latitude to work out the precise terms of their agreement.

As several of the early private enforcement cases neared settlement, the possibility of creating "environmental funds" came up.[227] These funds would be sums of money equivalent to the agreed-upon penalty, but instead of being paid into the U.S. Treasury, the money could be used to fund conservation-related work in the area where the violations took place. This could have advantages for both the plaintiff and the defendant. On the defense side, a local investment in the environment could at least partially offset the negative publicity typically associated with a penalty suit. It might also improve general quality of life for the firm's own employees, who would be potential users of amenities like a boat ramp or waterfront park purchased with the environmental fund. Moreover, the payment to a fund might even be tax deductible.[228] For the plaintiff groups, the prospect of investing the money in environmental restoration or improvement seemed preferable to having it disappear into the Treasury, where it would almost surely be diverted to different uses. The groups also could receive public relations benefits from the funds, if they insisted on acknowledgment in press releases, placards, and so on. If the defendants were willing, the funds might also be used to support the general operations of the groups.

It is difficult to discover what has been happening in practice with the environmental funds, since there is no centralized, authoritative source of data about settlements in citizen suits. Representatives from the regulated community have collected and made available some information about the disposition of settlement awards. Their tabulations indicate that settlements have been split among the federal treasury, state environmental and natural resource agencies, plaintiff organizations, and various charitable, educational, or public service entities that have some interest in environmental issues.[229] It is even less clear what environmental benefits are being realized from the funds. However, there is no question that plaintiffs' acceptance of the funds has increased the hostility to citizen suits among the defense bar, and given some credibility to the assertion that the plaintiffs are mere bounty hunters motivated by the prospect of a lucrative cash payoff.[230] For this reason alone, the environmental funds may eventually prove to be counterproductive.

The final major incentive created by the citizen suit provision is the opportunity for plaintiffs to recover costs and attorneys fees. This cost-recovery provision was included in the Water Act's citizen suit section because of the drafters' belief that "in bringing legitimate actions under this section citizens would be performing a public service."[231] In the terminology of contemporary economic theory, pollution abatement can be considered at least party a collective good, and therefore normal litigation incentives--including the "American rule" prohibiting fee recovery from the losing party[232]--will probably generate less private litigation to protect the resource than a social cost-benefit calculus would find desirable.

While the theoretical case for fee awards is straightforward, it is difficult to assess the practical operation of this provision at the present time. Very few of the current wave of enforcement cases have progressed far enough to produce a fee award. On the positive side, there is no indication from the judicial decisions that plaintiffs are bringing frivolous cases; their batting average so far seems remarkably high. But the real test of the fee incentives will come after a body of precedent accumulates resolving the dischargers' primary defenses. As discussed above, the risk of losing is a crucial element to the private law firms that are bringing citizen suits. Delay between the lawyer's investment of time and the ultimate fee recovery is also an important consideration: office and personal expenses continue to accumulate, even if the cash flow from citizen suits does not. At present, these downside risks seem to be limiting the number of private firms willing to take on citizen suits, and the number of cases those firms are able to handle. The technical nature of the field is also a barrier to entry. Gaining a working mastery of a complex regulatory program like the Clean Water Act, along with related knowledge of monitoring and treatment technologies, agency recordkeeping practices, and all of the other details that go into successful representation in citizen suits, requires considerable time and effort.

If the plaintiffs continue to prevail over motions to dismiss and defenses on the merits, both risk and delay should decrease markedly and the cases should become correspondingly more attractive.[233] If this happens, the plaintiffs' success may have a perverse effect: less expert lawyers and clients, less constrained by an ideological commitment to protect the environment, may be attracted to the field; and abuses may result. For the present, however, it seems clear that a small cluster of active plaintiffs' lawyers are making a considerable personal and firm investment, at some risk, in the current wave of citizen suits. Any perceived problems in the system seem more attributable to the citizen suit device itself than to the incentives currently offered to plaintiffs and their lawyers.

VII. STANDING AND THE LEGITIMACY OF PRIVATE ENFORCEMENT

The question of incentives touches upon what is probably the most fundamental issue in assessing the role of citizen suits: whether private enforcement will ultimately come to be regarded as a legitimate means of securing compliance with regulatory laws. That is, regulatory compliance is not only a question of the power of legal and monetary incentives, but also a matter of the acceptability of the ways that power is exercised. The legitimacy issue lies behind many of the claims and defenses asserted by the citizen suit defendants, as they seek to convince the courts that private plaintiffs are intruding themselves into a complex situation, and upsetting the network of reasonable expectations, understandings and commitments that have evolved to give practical content to broad legal requirements. Doctrinally, the legitimacy question is most directly raised by challenges to the plaintiffs' standing and the related claim that private enforcement is an unwarranted delegation of executive power.

A. Standing, Delegation and Separation of Powers

The legislative history of the Clean Water Act, where most of the standing claims have been litigated, suggests that the Congress intended to incorporate the liberalized law of standing developed by the Supreme Court in the early 1970s. The Conference Committee Report[234] indicates that the conferees changed the definition of "citizens" who are entitled to bring suit so that the statute would track the Supreme Court's then-recent decision in Sierra Club v. Morton.[235] Thus, the Act defined the citizen plaintiff as "a person or persons having an interest which is or may be adversely affected."[236] This meant that injuries to recreational and a esthetic interests, in addition to direct economic injury, would be sufficient grounds for establishing standing.[237]

Despite this fairly clear indication that Congress wished to expand private enforcers' standing private enforcers to include nontraditional kinds of injuries, there has been a considerable amount of litigation over standing in the current wave of citizen suits. Part of the motivation for this focus on standing has been tactical, in the sense that differing interpretations of the standing requirements impose different factual burdens on the parties bringing suit. If plaintiffs have to produce affidavits from affected members, then make those members available for depositions, and then brief and argue standing on a motion to dismiss, the costs of getting to the merits of the controversy case rise significantly.[238] Several different defense arguments could, if accepted, impose this kind of factual burden on the plaintiffs. Defendants generally try to push the standing requirement of injury-in-fact to approximate the kind of showing of individualized harm and causation that would be demanded in a private damage action such as nuisance. If the waterway in question is being polluted by multiple dischargers, the defendants may assert that plaintiffs have not been uniquely harmed by their discharges, and that granting the requested relief will not redress the plaintiffs' claimed injury.[239] In addition, when the litigation is being managed and perhaps initiated by a national environmental organization, defendants may invoke the standing doctrine in an attempt to show that the plaintiff organizations generate cases in the citizen suit campaign without adequate membership control. Thus, one defendant argued that "the concept of a representational suit is not so attenuated as to permit a large organization and its private attorneys to comb the nation in search of causes, commence lawsuits as they elect, and then scramble to find some affiliated person to endorse the action after-the-fact."[240]

Usually, however, the courts have not required the plaintiff organizations to go beyond standardized allegations that their members live or recreate near the affected waterway.[241] While they do require that plaintiffs identify specific members who claim to be injured by the defendants' discharges,[242] they have accepted affidavits from only a few members of a large organization.[243] The courts have also declined defendants' invitation to push citizen suit standing in the direction of a personal injury suit. They have refused to demand a showing that the particular discharge from the defendant's plant prevented the plaintiff's members from using the lake or stream, on the ground that such a restrictive interpretation would limit citizen suits to huge discharges or small waterways, in violation of the congressional intent.[244] Similarily, courts have held that total redressability of the harm is not a prerequisite to standing; instead, it is sufficient if a decision for the plaintiff would produce a public benefit[245]--and the deterrent effect of a penalty may constitute such a benefit.[246] Thus, standing issues are becoming a rather routine formality that plaintiffs can easily meet if they are careful to conform their allegations to the accepted formulae.

However, dismissing standing in this fashion as merely another technicality would miss a major part of what some defendants are trying to do by questioning the plaintiff's standing to sue. Since standing focusses on harm to the plaintiffs' interest, it provides a useful doctrinal vehicle for suggesting to the court that the discharges in question actually caused little or no harm to recreational uses of the resource, even though the pollution may have technically violated the permit. Thus, standing may open the door for defendants to raise the question of whether it is legitimate for the courts in particular or government in general to be interfering with the dischargers' activities at all; and (assuming that some corrective action is appropriate), whether government's regulatory power can legitimately be invoked by private parties.

Challenges to the legitimacy of imposing sanctions for trivial violations may be based on the assumption that beneficial economic activity ought not to be subject to legal sanction unless it unreasonably interfere with other legitimate interests. According to Professor William Rodgers, this assumption has a long history in the American law governing use of natural resources:

> [I]ndustrial interests traditionally have viewed "pollution" as a "relative thing." In the words of one industry spokesman: "Pollution is the discharge of material that unreasonably impairs the quality of water for maximum beneficial use in the overall public interest." According to the National Association of Manufacturers, "This definition of pollution hinges on the word 'unreasonable.' Economic, sociological, and political factors will inevitably influence any attempt to agree upon an interpretation."[247]

In Rodgers' opinion, this relativist view of pollution has several implications for the enforcement process--notably, that enforcers have the burden of showing unreasonable harm, and that "enforcement is a particularly local concern because the unique characteristics of the receiving water, the economics of the discharging plant, and even the prevailing political tolerance level, are crucial to any decisions to compel treatment or process change."[248] From this perspective, decisions to enforce legal requirements strictly against trivial violations would have questionable legitimacy, regardless of who was doing the enforcing. Even if the law speaks in the absolute language of fixed numerical limits and strict liability, there is still an expectation that it will be "reasonably" enforced.

When private enforcers enter the picture, this expectation may be defeated. These "self-appointed" guardians of the environment, from the dischargers' perspective, can disrupt existing legal structures of authority and accountability, which are based on the division between public and private law. While wrongs to individuals are properly the domain of private liability, wrongs to the general public are properly brought only by public officials. In this view, the phrase "private attorney general" is not just an oxymoron; it is virtually a logical impossibility.

The bipolar view is probably articulated most clearly in the Monsanto case, where defendants sought to raise the legitimacy issue both in a standing motion, and in an unusual claim that the Clean Water Act's citizen suit provision was an unconstitutional delegation of executive power. The company's brief on the delegation issue asserted that the plaintiffs had claimed "sovereign equivalence" in assuming "the unique and awesome civil penalty enforcement power," and had used this power much differently from the responsible federal and state agencies: "[T]he entire rationale of plaintiffs' suit appears to be bottomed on a punishment theory rather than a compensatory theory of injuries actually suffered by plaintiffs."[249] In the terms used by social scientists, the plaintiffs had effectively converted a compliance system into a penal system,[250] and Monsanto argued that this was an unconstitutional arrogation of power by the plaintiff organizations. Some commentators have raised similar concerns, though not in the same constitutional terms. Joseph Guida[251] has suggested that the citizen suit plaintiffs can be viewed as a "shadow government" whose exercise of enforcement powers is "inimical to fundamental notions of representative government and the oaths of office taken by" agency officials.

The plaintiff organizations naturally take a much different view of the citizen suit concept--and so, for the most part, have the courts.[252] Many of the environmental group representatives[253] believe that the Clean Water Act permits them--indeed, was designed to permit them--to "stand in the shoes of government" and sue as enforcers vindicating a general public interest in environmental protection, rather than as a spokesmen for the individual interests of specific members who may be harmed by a particular discharge.[254] In this view, the private attorney general concept evolved over a period of decades and won general acceptance by the 1970s as a result of the widespread perception that effective public participation was necessary to overcome the resource shortages, institutional constraints, and risks of capture that make the administrative agencies chronically timid enforcers.[255]

These debates over the legitimacy of private enforcement also are relevant to the standing doctrine, especially since recent Supreme Court decisions have begun to address standing issues in terms of the separation of powers among the branches of the federal government. This approach was stated most clearly in Allen v. Wright,[256] where the majority observed that "the law of Article III standing is built on a single basic idea--the idea of separation of powers."[257] At the same time, however, the Court noted that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition,"[258] and so the relationship between private enforcement devices like the citizen suit and separation of powers remains somewhat obscure.

The primary concern expressed by the Court in Allen v. Wright -- the fear that weakening of the standing doctrine's injury-in-fact requirement might lead to adjudication of abstract controversies in which the plaintiffs would have no real connection to or stake in the particular issues being litigated--seems not to apply to citizen suit standing as interpreted by the lower courts. Plaintiffs are being required to plead and prove harm to property, recreational, or aesthetic interests in the particular waterway where the discharge is occurring, and the factual issues being litigated on the merits are generally very concrete and specific. In this respect, citizen suit standing seems to fulfill one of the primary functions of the injury-in-fact requirement described in the Court´s 1982 opinion in the _Valley Forge Christian College_ case: that the issues be presented "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[259] Beyond this rather amorphous principle, the recent Supreme Court standing cases provide little guidance on the functional aspects of separation of powers that might be implicated by citizen suits.[260]

Apart from the case law, there is at least superficial appeal in the notion that law enforcement--the duty to "take care that the laws be faithfully executed"--is inherently an executive function which ought not to be usurped by courts and private litigants.[261] This position was developed by Judge Scalia in a law review article analyzing the role of the standing doctrine in preserved separation of powers.[262] According to Scalia, courts exist solely to redress unique, individualized, "nonmajoritarian" harms. Majoritarian harms--those which fall broadly and relatively equally on a large sector of the populace--are properly the concern of the political branches, and constitutional notions of separation of powes impliedly "limit the power of Congress to convert generalized benefits into legal rights."[263] Presumably private enforcement of pollution control laws would raise some of these problems, at least if it is true, as the defense commonly argues, that plaintiffs may have only a trivial interest in the abatement of any particular pollution source.

There are several problems with this analysis, at least as applied to citizen suits. Most obviously, the notion of unique, nonmajoritarian redressable harm is not a tightly bounded category that exists in the world apart from legal definitions of injury. This is evident in the analogous field of nuisance law, where the boundary between "public" and "private" nuisance actions against polluters has been highly variable from state to state, and over time.[264] Thus, when validly enacted legislation says that boaters or fishermen are sufficiently injured by pollution to invoke the judicial machinery, there may no be principled basis for courts to devise more stringent standing criteria and reject that determination. Second, to the extent that losses of environmental amenity are regarded as "majoritarian" harms, there may be collective goods problems that prevent the political system from providing optimal quantities.[265] If so, then the individualized enforcement incentives built into the citizen suit can serve as a corrective to the free rider problems inherent in collective goods. Most fundamentally, however, it is not clear what results separation of powers doctrine requires in the field of regulatory enforcement.

According to Scalia, separation of powers concerns are raised by a liberalized law of standing because lowering the standing barrier can inject the courts into the province of administrators in two ways: It can affect the time at which certain issues are presented to the courts, and it can interfere with the power of administrators to modify or nullify regulatory laws by failing to enforce them.[266] Of these two claims for noninterference, the latter is clearly the more important, and the more directly threatened by private enforcement. Yet, separation of powers arguments have traditionally been made for the opposite position--that is, that allowing administrators to repeal statutes by desuetude violates the constitutional allocation of powers and responsibilities:

> "The doctrine of separation of powers ... stands in the way of holding that a legislative enactment which complies with constitutional requirements can be rendered ineffective by non-use or obsolescence or repeated by failure those entrusted with its administration to enforce it." In short, the rejection of desuetude is only superficially a limitation on the judiciary. Its essence is a limitation on the executive.[267]

In this view, private enforcement could serve to correct a separation of powers deficiency by overriding bureaucratic defiance and carrying out the will of the political branches as authoritatively expressed in legislation.[268]

If the separation of powers consequences of private regulatory enforcement are indeterminate as a matter of constitutional doctrine, then the key question becomes an empirical one: what will private regulatory enforcement do to the structures of control, accountability, and legitimacy that have evolved to govern the modern regulatory state? At present, there are no definitive answers to this question; but both the historical record and some current developments in the field of environmental protection suggest that private enforcement has a strong claim to legitimacy.

B. Common Informers and Private Attorneys General: Citizen Suits in Historial Perspective

While the citizen suit appears to be a new technique for enforcing regulatory statutes, the concept of shared public and private responsibility for enforcement can be traced back at least 600 years in Anglo-American law. In 1388, Richard II and the English Parliament[269] enacted a water pollution statute designed to deal with a serious public health risk.[270] The problem, as described in the statute, was "that so much Dung and Filth of the Garbarge and Intrails as well as of Beasts killed, as of other corruptions, be cast and put in Ditches, Rivers, and other Waters, ... that the air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen." Like many modern pollution control statutes, this one provided both for the cleanup of past pollution by a set deadline and for the prevention of future pollution. Also like many modern statutes, it provided for a dual system of enforcement; either public officials or others who "feel [themselves] grieved" or who "will complain" could bring enforcement actions. The penalty for unremedied past violations was set by the legislature, whereas that for future violations was left to the considerable discretion of the chancellor.[271]

In several respects, the 1388 water pollution act was a logical outgrowth of a legal system based on very different assumptions from modern American legal culture. Distinctions between statutory and common law, and between public and private law, held little significance in the post-conquest English judicial system. Like other early statutes, the 1388 water pollution act came to be considered part of the common law,[272] and was eventually incorporated into the law of public nuisance.[273] Eventually it came to be conventional wisdom that only public authorities could bring actions against public nuisances.[274] But at the time of its enactment, the 1388 law was part of an undifferentiated body of authoritative rules[275] whose breach might result in multiple remedies at the instance of different parties. Thus a rule-violating deed could give rise to legal action by a representative of public authority as well as to one by a private individual.[276] What was often different about the two actions, as a practical matter, was the remedy sought. Public authorities were perhaps generally more interested in punishing and deterring wrongful behavior; private plaintiffs were perhaps generally more interested in getting compensation for the injuries they had suffered and in preventing future injuries.[277] But then again, authorities often were quite interested in collecting the revenues they expected from imposing fines for wrongful acts. Conversely, private plaintiffs often were motivated primarily by the desire to punish wrongful behavior.

In any event, it is important to understand that a singular definition of wrongful behavior gave rise to various possible legal actions. Only over time did English and American legal doctrine attempt to establish a systematic distinction between public and private actions based on ostensibly separate domains of public and private rights.[278] In the meantime, most of the different actions were distinguished by what type of remedy was sought, by whom, and who had authority to provide it. It is impossible here to summarize meaningfully the complex process by which the "writ system" of legal actions changed from the fourteenth to nineteenth centuries,[279] but several key points can be noted. First, the authoritative rules that comprise "law" came from a variety of sources. In addition to statutes, there were two other major sources of authoritative rules. The first, in the early centuries after the Norman Conquest, were very local, and now are all but forgotten. They included the county, the hundred,[280] and the manor.[281] The division of "jurisdiction" among them is lost to us, but it is clear that in the early times after the Conquest these local courts would have settled local disputes and determined local policy regarding such matters as pollution control and natural resource use. Typically their decisions were based on established customs, which varied greatly by locale. Since these courts generally were quite close to local residents, it would have been common for those residents to bring actions in the local courts to enforce the applicable community rules.

The local courts were gradually supplanted by the king's courts that produced the writ system and most of what we now call the common law. Like the local courts, they probably considered themselves as merely defining and enforcing established norms and customs. But they had much larger effects. First, of course, they pressed toward the establishment of a single set of legal norms governing the entire realm. Second, in responding to new problems over time they gradually created a body of rules which went far beyond the system they inherited. The 1388 statute quoted above, for example, eventually was absorbed into the much larger body of nuisance law, which was capable of encompassing an almost unlimited array annoyances and requested remedies. Over time common law judges sought to impose certain unifying constraints on this developing body of law, such as the distinction between public and private nuisances.[282] In the meantime, however, private prosecutions for acts that might eventually be defined as public nuisances seem to have been common, in significant part because many such nuisances would also interfere with various interests in the use and enjoyment of property.

A second key point is that an equally diverse array of remedies and enforcement mechanisms was available for application to rule-violating behavior. Thus a given infraction might be punished by imprisonment, a fine, an injunction (generally backed by the threat of imprisonment or fine), or damages. In addition, there might be a variety of reasons for prosecuting an offense. A public official might wish to put down a perceived threat to his effective rule, placate his superiors, or obtain part of the reward for convicting an offender; a private plaintiff might wish to receive compensation for past injuries, obtain an injunction against possible future injuries, punish an offender for violating a common code, or garner a portion of the fine an offender would be required to pay. All of these incentives appear to have been common during most of the history of the common law.

Although private enforcement seems to have been common through the nineteenth century, the general understanding of its role seems to have changed over time. In the first few centuries after the Conquest, as we have suggested, it appears that private enforcement was common because there was no well developed conceptual distinction between public and private functions. Any violation of community rules was the business of the entire community, and all its members. We might even speculate that authorities encouraged community members to participate in prosecuting wrongs, because participating increased members' investment in and commitment to the existing order, and increased their own sense of obligation to comply with the rules. By the same token, such a commitment to the existing order might often have been sufficient incentive to promote considerable private enforcement, and to legitimate it.

By the dawn of the industrial revolution, the basis of private enforcement appears to have shifted considerably. By mid-eighteenth century the view was widespread in England that the country was suffering from an epidemic of crime, largely perpetrated the growing urban lower class.[283] At that time, the country still had no substantial police force, either centralized or local.[284] The response to the problem took several forms. First, more severe penalties for many offenses were widely advocated, and frequently enacted.[285] Second, many new offenses were created, especially for petty crimes like vagrancy, drinking, and the like.[286] Third, there were major efforts to deter crime by greatly increasing the incentives for private enforcement. In cases of particularly heinous crimes, government agencies would often advertise rewards for capture or conviction of their perpetrators. Wealthy parties would regularly do the same when they had been the victims of crime -- to the extent that failure to do so "was likely to be interpreted as an offer of impunity to the offenders."[287] In addition, numerous new common informers statutes were passed providing that parties aiding in the apprehension and conviction of violators would share in the fines collected as a result. In sum, while the diagnosis of the problem was basically moralistic, the proposed solutions were highly utilitarian: the legal system sought to increase the costs of crime by increasing the penalties, and to enlist the citizenry in the enforcement process by making private prosecution lucrative.[288] In practice, however, the theory was to confront a variety of problems.

In the heyday of the English common informer's actions, they were available for a wide variety of offenses. Private actions could be brought to penalize violators of price and quality regulations for consumer goods, such as merchants "selling salt above the assize price," or bakers offering bread made with unwholesome materials; to enforce regimes of occupational licensing and taxation, including a "pawnbroker trading without a license, or keeping more than one shop under a single license" and a person "practis[ing] as an apothecary without the necessary certificate"; and to punish "Offenses leading to Corruption of Morals," such as a publican allowing "gaming in his house by journeymen, labourers, servants, or apprentices" or a "person found guilty of having opened, without license, disorderly houses, or gardens for music and dancing or for entertainment in, or within twenty miles of London".[289]

Several features of these statutes made them vulnerable to abuse and resistance. The offenses themselves were largely victimless "crimes" -- if indeed they could properly be regarded as crimes at all. The overt class bias and paternalism in these informers' statutes also seemed calculated to inspire resentment among those who were being regulated. Occasionally, the "regulatory backlash" was immediate and unmistakable;[290] more commonly, however, the effect of excessive enforcement of these petty laws was a growing disrespect for the laws themselves, and widespread contempt for those who enforced them. "In the end," Radzinowicz notes, "this long-continued distaste caused the very name of common informer to be regarded as a term of abuse,"[291] and the actions were eventually abolished. Thus, the early history of the common informer's action indicates that private enforcement can undermine rather than reinforce the purposes of the relevant statutes, particularly if those purposes are not widely shared by the affected populace. Moreover, even when the underlying law serves a widely accepted public purpose, the incentives created to induce private enforcers to bring suit may exceed the bounds of the society's tolerance for enforcement. When this happens, the enforcers may come to be regarded not as legitimate spokesmen for the public interest, but rather as "'unprincipled pettifoggers' whose office [is] a nuisance and 'an instrument of individual extortion, caprice and tyranny.'"[292]

While some of the English history suggests that private regulatory enforcement can lead to abuses and backlash, the recent American experience indicates that this is not an inevitable result. As the Supreme Court pointed out during the early decades of this century, _qui tam_ actions providing private enforcers with a share of criminal fines "have been in existence ... in this country ever since the foundation of our government,"[293] and "have not been without defense by the courts."[294] Similarly, private prosecution of criminal cases, without the financial incentive of the _qui tam_ bounty, was traditionally a common feature of American public law. As late as 1955, a law review survey found that the practice was still extensively used:

> In thirty jurisdictions, appellate courts have decided that privately employed attorneys may assist the public prosecutor, while only three have said that they may not. Moreover, sixty-two percent of 151 public prosecutors from forty-five states who responded to a questionnaire on prosecution procedures stated that they permit privately hired attorneys to assist in criminal proceedings. Most states find authority for permitting private prosecution in the inherent power of the court to administer justice. ... No restrictions have been placed on the crimes private attorneys may assist in prosecuting.[295]

In jurisdictions where private prosecutions were permitted, courts sometimes took responsibility for coordinating public and private efforts, and assuring "that a public prosecution for a criminal offense does not degenerate into a private persecution [or] ... the gratification of private malice."[296] One method of doing this was to require that the private prosecutor remain under the control and supervision of the responsible public official.[297]

As private prosecutions gave way to the monopoly of public prosecutorial bureaucracies, concern for the accountability of public prosecutors began to grow. The decision not to prosecute, which may have occasioned relatively little concern when private parties were free to take the initiative, now posed both a systemic problem and a problem of individual justice. Decisions to drop a case, or to bargain it down to a lesser charge, might be the product not of a considered judgment of the social threat posed by the offender and offense, but rather the result of "corruption, political ambition, or insufficiency of funds or personnel."[298] Thus, enforcement could fall below the level needed to maintain deterrence and respect for the law. At the same time, unconstrained discretion to refrain from prosecution created a risk of injustice to particular individuals. As Kenneth Culp Davis pointedly asked in Discretionary Justice, "If [the prosecutor] finds that A and B are equally guilty of felony and equally deserving of prosecution, why should he be permitted to prosecute B for felony but to let A off with a plea of guilty to a misdemeanor, unless he has a rational and legal basis for his choice, stated on an open record? ... Why should he have complete power to decide that one statute ... shall not be enforced at all, [and] that another statute will be fully enforced ...?"[299] Defenders of broad prosecutioral discretion were generally unable to provide a convincing answer to these questions.

In short, experience has shown that both an extensive system of private prosecution and a public monopoly in criminal enforcement are susceptible to abuse. What is necessary is to find the appropriate mix of public and private enforcement that will fit the particular time and its social needs, and then to provide adequate systems of accountability to prevent abuse.

VIII. CONCLUSION

Although solutions to many problems still need to be worked out, there is reason to be cautiously optimistic that private enforcement modeled on the citizen suit provisions of federal environmental laws will prove to be a useful device for achieving compliance with regulatory laws. Whether that promise will be fully realized depends in part upon development of appropriate legal doctrines and management practices; but more fundamentally the success or failure of private enforcement appears to be a function of the relationships and attitudes among the principal actors.

Despite the fact that private enforcement has eroded administrative control over the enforcement process, the agencies still retain a dominant position in defining and implementing enforcement policy. At least at the federal level, the growth of private enforcement seems to be acting as a competitive spur to government enforcers, prodding them to improve their management tools for measuring, securing, and overseeing compliance. This increased emphasis on compliance might well have evolved even without the consistent presence of private enforcers. Several of the major environmental laws have been on the books for more than a decade, and a shift from policymaking to policing seems a natural part of the life cycle of regulatory statutes. Still, there is no doubt that private enforcement helped to keep compliance issues high on the agendas of top agency officials, and gave additional urgency to their attempts to abate the most serious violations.

While citizen suits are prodding EPA and the state agencies to reassert their control over environmental enforcers, it seems unlikely that government can wholly recapture its enforcement monopoly. In the short run, at least, compliance rates are not likely to rise to such high levels that private enforcement becomes unnecessary, or unattractive to the plaintiff organizations. The sweep of environmental regulation is too broad, the resources available to the agencies for enforcement too modest, and the difficulties to the regulated industries too severe to predict dramatic increases in the compliance rates. Thus, barring a legislative movement to repeal citizen suit provisions, which has not yet materialized, private enforcement will probably continue to be a significant force in environmental reguation. But the agencies will retain the initiative in responding to private enforcers. By deciding how regulations will define compliance, what kinds of monitoring and reporting will be required, how compliance information is gathered and dissemanted, and what levels of noncompliance are actionable, EPA and the state agencies will effectively determine what role private enforcement can play in particular regulatory programs. So far, the agencies have not given much attention to private enforcement when making these kinds of decisions, although their attempts to improve their management capabilities have generally benefitted private plaintiffs. These conditions could change in the future, especially if agency officials conclude that private enforcement is counterproductive or unduly disruptive of their own activities and priorities.

The groups bringing the private enforcement actions have to be concerned not only about the agencies' response to them, but also about three other potential problems. Most immediate is the need to continue the string of court victories, in order to make private enforcement a legal and economic success. A few adverse precedents could increase the delay and riskiness of fee recovery sufficiently that private enforcement would be limited to a *pro bono* activity. If they can manage to accomplish this, the plaintiff organizations may then have to deal with the opposite problem of success. That is, private enforcement may become too attractive to litigants who lack the skills to prosecute complex cases, or who have the wrong motivation for bringing suit. As victory in private enforcement cases becomes easier, the quality control problem will likely become more severe. Energies may have to be shifted from the actual bringing of cases into educational programs and development of guidelines for case selection, settlement, penalty calculation, and the like. Plaintiff organizations have begun to do this to a limited extent, but so far the activities have been small-scale and informal.

The third question affecting the long-term success of private enforcers is whether they will be able to convert courtroom victories into actual environmental gains. This is partly a resource problem, because tightening the screws on compliance will bring increased pressure to bear on the other parts of the regulatory system, where there is typically no fee recovery provision to support legal representation. Thus, if private enforcement makes it clear that Clean Water Act permits will be strictly enforced, dischargers can be expected to redouble their efforts to weaken permit limits, to expand the availability of variances and acceptable excuses for permit violations, and to liberalize the effluent guidelines governing permit-writing. All of these efforts can easily involve lengthy, expensive administrative proceedings and judicial review. The plaintiff organizations have participated sporadically in these other stages of the regulatory process, but it seems clear that they presently lack the capacity for sustained, comprehensive presence at all of the key decisionmaking stages.

Beyond the resource questions, however, is a more fundamental issue of whether private enforcement will be grudgingly accepted or bitterly resisted by the regulated industries and their representatives. Plainly, there is considerable resentment within the regulatory community at having the "rules of the game" changed and established relationships and understandings undermined by private enforcement campaigns. There is also widespread skepticism not only about the motivations of private enforcers, but also about their legitimacy as surrogates for government. These attitudes could harden into unremitting legal and political opposition to private enforcement--indeed, to all regulatory enforcement--or could instead dissipate over time, as private enforcers gain acceptance as regular participants in the enforcement process. The direction of development seems to depend less on the inherent characteristics of the citizen suit than on the nature and quality of the relationships that evolve among the major parties.

In the model of regulatory behavior applied here, the quality of the ongoing relationships existing among participants in a regime of social control will greatly influence, if not determine, the efficacy of that regime. Thus, the effectiveness of traditional economic regulation has always depended on the relationship between the regulatory agency and the regulated industry. The familiar "capture" theory holds that an overly cooperative regulatory agency can easily become subservient to the demands of the regulated industry. When this happens, a standard remedy is to replace the agency's leadership with more independent and committed administrators who will be less sympathetic to the needs and desires of industry. Any resistance from the regulated industry should then be met with sheer coercive power, and the agency will then be able to fulfill its protective mission.

However, the American regulatory experience suggests that effective regulation is rarely as simple as this. Rather, the relationships between the regulators and their constituencies are inherently complicated, because administrators must achieve ongoing cooperation in the face of partially or predominantly divergent interests. Regulatees often have the means to frustrate regulators' ends by adopting tactics like information withholding, subtle resistance to implementation, perverse responses to regulatory orders, political counterattacks, and the like. At the same time, the regulators generally have the capacity to inflict substantial expense and aggrevation on the regulated, or at least on those firms considered "bad apples." As a result, the regulator/regulatee relationship is often characterized by a substantial degree of mutual dependency.[300] In this context, the parties will have choices about how to define their relationship. Although such choices will to some degree reflect the pecularities of the situation, they will also reflect the three general factors that this article has focused upon: the material interests of the parties, the percieved legitimacy of the regulatory endeavor, and the history of relationships among the parties. Robert Axelrod and others have hypothesized that when the regulatory activity is accepted as legitimate, and when regulator and regulatee have both an interest in each other's survival and the long term ability to punish or reward each other for past behavior, cooperative relationships are likely to emerge.[301]

What is new about private enforcement, of course, is the large role the private enforcers are attempting to play in the compliance process. Although the citizen suit provisions were originally responses to perceived problems of capture and favoritism in the traditional model of regulation, some scholars have recently argued that they are likely to create more problems than they solve. Richard Stewart, for example, suggests that expanded third party rights like the citizen suit are likely to be disfunctioning for several reasons: environmental groups increase regulatory transactions costs; they are single-issue interests, and therefore may ignore or discount competing values; they are often most effective in garnering resources from an adversarial posture; and the environmental regulatory agencies themselves may reinforce these tendencies, because these agencies have little responsibility for the industries they regulate.[302] While we have not seen much evidence to confirm his thesis in the research described in this article, we are also not persuaded that it captures the key problems as a matter of theory.

A previously noted, assessments of the impacts of third-party interventions like private enforcement depend heavily both on the observer's belief about the substantive desirability of the regulatory program, and on its compliance history. That is, if one believes that third-party participation will disrupt the status quo, it them becomes necessary to ask wehether that status quo is good or bad, and how and why it developed the way it did. In the case of environmental compliance, the argument that giving increased leverage to single-issue constituency groups might "tilt" agency policy unduly toward protectionist values implies that the existing system reflects a desirable (or at least acceptable) social equilibrium. However, the recent political history of EPA enforcedment suggests that the voluntary compliance strategy of the 1980s was generally perceived as an unacceptable tilt in the other direction, and that there is a social demand for enhanced compliance and enforcement. In such a situation, opportunities for third party intervention might better be viewed as a corrective device that helps to keep the agency from straying too far outside the bounds of political consensus.

A second theoretical problem is that interest-analysis models like the one used by Professor Stewart, which seek to indentify external, objective interests that drive or influence the participant's behavior, can be faulted for defining interest too narrowly. Short-term interests may conflict with long-term goals; perceived interests may vary from "real" interests; and perceptions of interest may be shaped by forces that are not easily translated into economic incentives, such as status needs and social relationships. A complete theory of ongoing relationships in the regulatory arena would have to take account of these broader dimensions of the concept of interest. More specifically, Richard Axelrod's work suggests that environmental groups are likely to seek cooperative relationships to the degree that (a) they have [or perceive that they have] long term interests in the regulatory arena; and (b) the other players can punish or reward them for their past behavior (and vice-versa). On the other hand, their role is likely to be disfunctional if they frequently operate as "gypsies" --that is, players who flit in and out of the game with no long term interests in it.

Our research thus far suggests that environmental groups often have, perceive and act upon long-term personal and institutional interests in the environmental policy arena, and that these interests pose definite constraints on their behavior. Most of the organizations sponsoring private enforcement suits also have other major involvements in environmental regulation. They constantly participate in formal rulemakings and informal negotiations of all kinds. Crucial to their success in these undertakings is what they and the other parties often call "credibility". Credibility means being tough (carrying through on threats and promises), being competent (understanding the issues, having access to the decisionmakers), and being reasonable (compromising where appropriate, looking for areas of common ground). If an environmental group (or other party) loses its credibility, it becomes less effectual, less able to pursue its interests effectively.

What seems crucial is that most of the parties in the regulatory arena have ongoing relationships with each other, and that those relationships are not mere reflections (or vectors) of their external interests. Rather, they are also "constitutive"; they help both to determine the nature of regulatory policy and even to define the content of the various interests. The ongoing relationships help define the content of interests because environmental regulation is necessarily an exercise in the management of massive uncertainty. What is desirable for any interest, particularly in light of the demands of other interests, is often unclear until substantial discussions have occurred. Second, the parties often come from common backgrounds in schooling, disciplinary traditions, and work experience, and they generally work with each other on a regular basis. As a result, they seek both to win each other's respect and to mold each other's understandings of the issues. They act, in other words, not only to further their interest, but also to improve and consolidate their relationships with each other. Both their long term interests and the quality of their work lives depend in part on those relationships.

In essence, then, the regulatory arena has many of the attributes of any other human community. Its members pursue their own interests within that community. But at the same time their perceptions of those intersts are partly shaped by the community. Perhaps most importantly, they spend much time in the community not merely attempting to advance their interests, but to define the very rules under which the community should operate -- to implement their visions of the good regulatory system in this case. To be sure, such visions will be shaped by their interests, and their interests will pose constraints on the outcomes acceptable to them. But to understand the general operation of citizen suit provisions in the regulatory system we must understand these community-like attributes of environmental regulation.

When we view the citizen suit statutes as effectuating the private enforcer's membership in the regulatory community, they become both easier to understand and harder to discount. On the one hand, it is not surprising that the environmental groups should want to seize the initiative in enforcing regulatory rules, since, like the community members in Fourteenth Century England discussed above, they may feel a certain amount of ownership in those rules. On the other hand, the added participation surely complicate relations within the community and may make it somewhat harder to work out and implement rules than it would be without them, leading analysts like Stewart to ponder whether they are a desirable addition.

On the whole, we see no attractive alternative. The addition of environmental groups to the regulatory community both helps to make the regulatory more congruent with the structure of the larger political community of which it is the administrative arm, and eases the transfer of values and information between the smaller and larger units. The presence of environmental interests provides an important corrective not only for problems like agency capture, but for unduly narrow decisions which may result when an agency has too few conduits to its political environment.[303] Because it is virtually impossible for legislatures to determine pollution policy in any detail, large and direct delegations of authority are a necessary and probably desirable fact of life in modern policy arenas like environmental regulation.[304] The active participation of environmental organizations in the formulation and implementation of environmental policy can help both to keep it from getting too far out of kilter with the broader political environment and to legitimate it where legislative directives are unclear or its administration appears overly subject to political swings. To be sure, making private enforcement work requires coping with the problems of coordination, incentives and legitimacy detailed above. But both the empirical and theoretical cases against private enforcement are much weaker than those for it at present. The important scholarly task, then, is to determine how those challenges are in fact being handled and how they might be better handled. They will necessarily be confronted in the day to day operations of the regulatory community and in the relationships that its parties continue to develop with each other. More abstract speculation on the functioning or desirability of citizen suits will get us nowhere. We need to understand the operation of the policy community in much more detail than we presently do to make any significant advances in the design of the regulatory institution called the citizen suit.

FOOTNOTES

[+] This Article is a revised version of a report prepared for the Administrative Conference of the United States, which has made recommendations to improve the coordination of public and private enforcement activities. *See* 50 Fed. Reg. 28,363 (1985). However, the opinions expressed in this Article are not necessarily those of the Administrative Conference, and the authors are solely responsible for any errors or omissions.

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1. *See* text accompanying notes 79-84, *infra*.

2. *See* text accompanying notes 269-71, *infra*.

3. *See* text accompanying notes 283-92, *infra*.

4. *See, e.g.*, Erickson, *Antitrust Treble Damage Actions: Do They Work?*, 61 Cal. L. Rev. 1319 (1973).

5. *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193 (1982).

6. *E.g.*, Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233 (1984); Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government "Subsidized" Litigation*, 47 Law & Contemp. Probs. 211 (1984); Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 Law & Contemp. Probs. 187 (1984).

7. The perception of ineffectiveness underlying moves to deregulate is based on differing visions of the regulatory state. At one extreme, some critics see too much regulation because they emphasize the ways in which government's regulatory initiatives create more problems than they solve. At the other extreme, agencies are faulted for achieving too little because they address only a limited range of social problems, and because they lack the will or the capacity to regulate vigorously. *See, e.g.*, G. Eads and M. Fix, *Relief or Reform: Reagan's Regulatory Dilemma* 87-105 (paper ed. 1984). Regardless of the underlying vision, a perception that regulatory agencies have been and are likely to remain ineffective makes alternatives to regulation more attractive.

8. 50 Fed. Reg. 28, 363 (1985).

9. The major analyst of the role of legitimacy in compliance with legal directives is of course Max Weber, and his discussion of the issues still merits study. *See, e.g.*, Weber, Economy and Society, 21 (1968). Recent noteworthy studies which give the legitimacy-producing aspects of law a central role include Hay, *Property Authority, and Criminal Law* in Albion's Fatal Tree: Crime and Society in Eighteenth Century England (D. Hay, *et. al* eds. 1975) and Freeman, *Antidiscrimination Law: A Critical Review* in The Politics of Law: A Progressive Critique (D. Kairys, ed. 1982). For a criticism of the concept *see* Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wisc. L. Rev. 379.

10. M. Bernstein, Regulating Business By Independent Commission (1955).

11. Other causes frequently cited as reasons for capture included the "revolving door" that brought a succession of industry people into positions of power in the regulatory agencies, then back to the industry where they could use their inside knowledge to advantage; and the "iron triangle" of industry groups, agencies, and congressional committee chairmen who cooperatively rebuffed demands for regulatory change. *See generally* S. Lazarus, The Genteel Populists (1974).

12. *See, e.g.*, Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 Geo. L.J. 51, 52-55 (1981).

13. J. Esposito, Vanishing Air (paper ed. 1970). Professor Richard Tobin notes that the 1970 Clean Air Act was heavily influenced by political maneuvering between President Nixon and Senator Edmund Muskie, who then appeared to be the leading candidate for the Democratic presidential nomination in 1972. Both had proposed clean air legislation, but Muskie's original bill would have made only minor changes in the existing regulatory structure compared to the more substantial changes in the Administration proposal. According to Tobin, the Nader Report "clobbered" Muskie:

> This scathing critique ... blamed Muskie for nearly every problem that existed. The senator was accused of providing inadequate support for NAPCA [the federal agency then responsible for air pollution], of ignoring the deficiencies of the Air Quality Act, and of failing to hold oversight hearings of NAPCA's activities. The Nader Report even suggested that Muskie resign his subcommittee

> chairmanship because of his alleged incapacity to operate in favor of the environment.
>
> These events pressured Muskie to recoup his reputation. A dramatic move was in order, and such a move came in mid-August when the Subcommittee on Air and Water Pollution reported its proposal for a new clean air law to the full Committee on Public Works.

R. Tobin, The Social Gamble 78-79 (1979).

14. R. Nader, Introduction to J. Esposito, *supra* note 51, at vii. The body of the Nader Report did not, *however*, provide a very explicit blueprint for citizen enforcement. As an exception to its general criticism of the Muskie bill described in the preceding footnote, the Report grudgingly acknowledged, "[a]mong the bill's better features is a provision allowing both federal government and private citizens to enforce state-established emission standards in federal court." *Id*. at 306. The Nader group also argued that the responsible federal agency should actively encourage citizen groups to exercise this authority:

> Nothing will be achieved in air pollution control until citizens can move past their generalized concerns with the problem, and exert action against specific sources. ... NAPCA's Office of Education and Information (OEI) should be permitted, if not indeed required, to go public. An inconsequential budget ... does not begin to match the needs that OEI should be serving: to establish citizen action groups around the country, to render professional guidance and technical expertise to such groups, to gather and publish detailed information about specific sources of pollution, to supply expert witnesses for testimony at state and local hearings and in lawsuits against polluters. This would be creative federal leadership.

Id. at 307-308. During the early implementation of the Clean Air Act, EPA did take some steps in this direction; *see* Ayres & Miller, Citizen Suits Under the Clean Air Act of 1970 (undated pamphlet published by USEPA; SUNYAB library accession stamp dated June, 1974).

15. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-37 (1970).

16. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3669. The

primary federal statute governing water pollution has undergone a number of popular name shifts during its nearly four decades of existence. Through most of the early years it was known as the Federal Water Pollution Control Act. After the 1965 amendment, it was sometimes referred to as the Water Quality Improvements Act; but in 1972 it reverted to the Federal Water Pollution Control Act (FWPCA). The 1977 amendments brought the popular name Clean Water Act, but the FWPCA label is still found frequently in post 1977 usage. In the interest of clarity, this Article will generally use the name "Clean Water Act" or the acronym CWA.

17. *See generally* Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103 (1970).

18. S. Rep. No. 92-414, *supra* note 16.

19. *See, e.g.*, Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 Ecology Law Q. 407 (1972).

20. Thus, the Senate Report on the Clean Air Act notes that the citizen suit provision "would not substitute a 'common law' or court-developed definition of air quality" for administrative standards, but rather would establish "an objective evidentiary standard [which] would have to be met by the citizen who brings an action under this section." S. Rep. No. 91-1196, *supra* note 15, at 36. Similarly, the Senate Report on the Clean Water Act states that the citizen suit provision would not give courts common-law power to define unacceptable levels of pollution, but rather would limit citizen initiatives to the enforcement of precise rules. S.Rep. No. 92-414, *supra* note 16, at 3475.

21. *E.g.*, Conference Committee Report on the Clean Air Act of 1970, 1970 U.S.C.C.A.N. 5388.

22. *See* text accompanying notes 47--167, *infra*.

23. *E.g.*, S.Rep. No. 92-414, *supra* note 16, at 3746-47 (Clean Water Act).

24. *See* statutes cited note 28, *infra*.

25. Section 304(a), 42 U.S.C. sec. 7604(a).

26. 33 U.S.C. sec. 1365. The Surface Mining Control and Reclamation Act, 30 U.S.C. sec. 1270 and the Outer Continental Shelf Lands Act, 42 U.S.C. sec. 1349, have similar provisions authorizing suit by any person having an interest actually or potentially adversely affected.

27. 405 U.S. 727 (1972). *See* Conference Report No. 92-1236, 1972 U.S.C.C.A.N. 3776, 3823.

28. Some citizen suit provisions vary significantly in this respect. For example, the Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. sec. 1415, and the Outer Continental Shelf Lands Act (OCSLA), 42 U.S.C. sec. 1349(a), do not authorize action forcing suits by private parties. On the other hand, citizen suit statutes such as the Clean Air Act, 42 U.S.C. sec. 7604, the Noise Control Act, 42 U.S.C. sec. 4911, and the Toxic Substances Control Act, 15 U.S.C. sec. 2619, exclude various aspects of information production, record-keeping, and reporting from citizen enforcement. Finally, the Resource Conservation and Recovery Act, 42 U.S.C. sec. 7002, allows citizens to enforce the entire Act, while EPA is limited to enforcing some but not all of its requirements.

29. If EPA brings such an enforcement action in Federal Court, the citizen suit provisions generally give private enforcers the right to intervene. *See e.g.*, 33 U.S.C. sec. 1365 (b)(1)(B) (Clean Water Act).

30. CAA sec. 304(b)(2), 42 U.S.C. sec. 7604(b)(2).

31. 33 U.S.C. sec. 1365(a). The 1984 amendments to RCRA include a comparable authorization for the court in a civil penalty action to "apply any appropriate civil penalities." H.Rep. No. 98-1133, 98th Cong., 2d Sess. 52 (1984).

32. *E.g.*, 33 U.S.C. sec. 1365(d) (Clean Water Act); 42 U.S.C. sec. 7604(d) (Clean Air Act).

33. Like any system of classification, the categories used here admittedly have some arbitrary dividing lines and debatable assumptions. Sorting the cases into these categories required a number of judgment calls, since the regulatory programs are quite complex and counsel were frequently creative in trying to apply the citizen suit provisions to their claims and defenses. Moreover, the decisions themselves were occasionally opaque, because courts deciding complex environmental cases frequently omit from their opinions a detailed description of the jurisdictional basis for the litigation. As a result, it is sometimes impossible to determine what relevance (if any) a citizen suit provision has to the various claims and defenses. Notwithstanding these limitations, the picture that emerges from the tabulations described in the text still seems reasonably accurate, and useful in understanding the impact of the citizen suit.

34. 33 U.S.C. sec. 1369.

35. 33 U.S.C. sec. 1369(b)(1)-(2). The comparable limit for judicial review under the Clean Air Act is 60 days. 42

U.S.C. sec. 7607(b)(1).

36. *See, e.g.*, Sun Enterprises, Ltd. v. Train, 394 F.Supp. 211 (S.D.N.Y. 1975), *affirmed*, 532 F.2d 280 (2d Cir. 1976).

37. *E.g.*, New England Legal Foundation v. Costle, 475 F.Supp. 425 (D. Conn. 1979); Council of Commuter Organizations v. Metropolitan Transit Authority, 524 F.Supp. 90 (S.D.N.Y. 1981) (both seeking to compel implementation and enforcement of a transportation control plan); District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980) (EPA failure to veto a state discharge permit under CWA not reviewable by citizen suit).

38. In Natural Resources Defense Council, Inc. v. Train, 519 F.2d 287 (D.C. Cir. 1975), a coalition of environmental groups challenged EPA's failure to list certain substances as toxic pollutants under the Clean Water Act. The court avoided decision on the applicability of the citizen suit provision, holding that the Administrative Procedure Act and other statutes pleaded by the groups provided an adequate basis for jurisdiction. 519 F.2d at 291.

39. District of Columbia v. Train, 633 F.2d 1250 (D.C. Cir. 1976), in which the District sued to prevent EPA from entering into and approving a consent decree with the General Services Administration imposing an air pollution compliance schedule for a federal heating plant, may have involved the use of a citizen suit provision as a defense; the opinion is not clear on this point.

40. In some instances, the challenged action was even brought in the district court rather than the court of appeals, just as a citizen suit would have been, and it relied on a similar claim of nondiscretionary duty. Thus, in *National Resource Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974), a coalition of environmental groups sought a judicial declaration that the EPA Administrator had violated the Act by failing to list certain substances as toxic pollutants within the time periods prescribed in the statute. EPA countered with the argument that such a claim to compel performance of a nondiscretionary duty could only be brought under the citizen suit provision, and since the plaintiffs had failed to comply with the 60-day notice requirement, their action should be dismissed. On appeal, the court relied upon the savings clause in the citizen suit provision to hold that the action could still be maintained under the general federal question statute and the Administrative Procedure Act, reasoning that Congress had intended to facilitate rather than limit public access to the courts in water pollution matters.

41. Goodyear v. LeCraw, 15 E.R.C. 1189 (S.D. Ga. 1980); Save the Bay, Inc. v. Administrator, 556 F.2d 1282 (5th Cir. 1977).

42. The cases arose in several different ways. In Massachusetts v. US Veterans Administration, 541 F.2d 119 (1st Cir. 1976), the state brought a citizen suit against a federal entity alleged to be polluting a stream in violation of applicable effluent limitations. California ex rel. State Water Resources Control Board v. EPA, the case which later brought the Clean Water Act issue to the Supreme Court (*see* note 43, *infra*), raised the citizen suit provision in a more convoluted context. The State plaintiffs had brought statutory review actions challenging the Administrator's limited approval of their proposed permit programs on the ground that his exemption of federal dischargers from the permit programs violated the Act. EPA responded that this procedural exemption did not impair the states' interest in pollution prevention, because the states could still enforce substantive requirements by bringing citizen suits against federal violators.

43. EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 578 (1976) (Clean Water Act); Hancock v. Train, 426 U.S. 167 (1976) (Clean Air Act).

44. *See, e.g.*, 33 U.S.C. 1323(a) (specifying that federal entities are subject to "any requirement whether substantive or procedural," including "any requirement respecting permits," in the Clean Water Act).

45. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

46. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). Less than a decade before, the Court had concluded that federal common law nuisance actions for water pollution could be brought by private parties. Illinois v. City of Milwaukee, 406 U.S. 91 (1972). For an example of a citizen suit damage action incorporating a common law nuisance claim, *see* City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.* Louisville & Jefferson Cty. Metropolitan Sewer Dist. v. City of Evansville, Ind., 444 U.S. 1025 (1980).

47. A possible exception is the action for response costs under the federal Superfund legislation. Parties who incur cleanup costs "consistent with the national contingency plan" may sue potentially responsible parties under 42 U.S.C. sec. 9607 to recover those costs; however, it is not clear whether they must obtain government approval before incurring the response costs. For an example of a case combining Superfund cost recovery with a Clean Water Act citizen suit, *see* Bulk Distribution Centers, Inc. v. Monsanto Co., LEXIS Slip op. No. 83-6805-Civ-Jag (S.D. Fla. June 19, 1984) (government must approve cleanup plan before cost-recovery action can be commenced; no showing of violation under Clean Water Act citizen suit provision).

Another basis for a federal claim which a private party may assert in an attempt to recover damages for water pollution is the Federal Tort Claims Act, which may apply when the government caused the pollution. In Davis v. United States, 722 F.2d 1157 (4th Cir. 1983), the plaintiff had brought a citizen suit relating to the same pollution, and obtained a settlement. He then brought suit under the Federal Tort Claims Act to recover damages to his clamming business caused by the pollution. The court held that his claim was essentially an implied right of private action, which was precluded by the _Sea Clammers_ case, _supra_ note 45.

48. Local authorities must avoid a variety of jurisdictional problems when they bring such actions. When a local authority sues EPA for violation of a nondiscretionary duty in denying its sewer funding application, it may be met with the defense that the action is essentially a claim for money damages against the federal government which must be brought in the Court of Claims under the exclusive jurisdiction provisions of the Tucker Act, 28 U.S.C. sec. 1491. _See, e.g._, Fairview Township v. EPA, 593 F.Supp. 1311 (M.D. Pa. 1984). The plaintiffs in _Fairview_ won reversal of the Tucker Act dismissal on appeal, but _nevertheless_ lost because they were unable to show that the EPA administrator had violated a nondiscretionary duty in denying their application. Thus, their citizen suit claim was dismissed. Fairview Township v. EPA, 773 F.2d 517 (3d Cir. 1985); _see also_ Atlantic City Municipal Utilities Auth. v. _Regional_ Administrator, EPA, 616 F.Supp. 722 (D.N.J. 1985). If the error in processing the grant application was made by state officials, the municipality may also have its claim rejected on the ground that the federal citizen suit provision does not create a federal cause of action against state officials who may have violated nondiscretionary duties under state law. Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167 (3d Cir. 1984).

49. One of the disputes, the _Allen Park_ litigation described below at text accompanying notes 84-85, generated two opinions by the district court.

50. Cases were dismissed for failure to provide the 60 days' notice required by statute (Ventnor v. Fri, 6 E.R.C. 2104 (D.N.J. 1974); Concerned Citizens of Bushkill Twp. v. Costle, 468 F.Supp. 21 (E.D. Pa. 1978)); failure to allege violation of a nondiscretionary duty (Concerned Citizens, _supra_; J.E. Brenneman Co. v. Schramm, 473 F.Supp. 1316 (E.D. Pa. 1979)); and lack of standing (Brenneman v. Schramm, _supra_).

51. 501 F.Supp. 1007 (E.D. Mich. 1980), _application for modification denied_, 573 F.Supp. 1481 (E.D. Mich. 1983).

52. 573 F.Supp. at 1486.

53. Biederman v. Scharbarth, 483 F.Supp. 809 (E.D. Wisc. 1980).

54. Higbee v. Starr, 698 F.2d 945 (8th Cir. 1983) (denial of preliminary injunction affirmed), 598 F.Supp. 323 (E.D. Ark. 1984) (action dismissed).

55. Town of North Hempstead v. Village of North Hills, 482 F.Supp. 900 (E.D.N.Y. 1979).

56. The citizen suit is not the only jurisdictional "handle" that aggressive plaintiffs can use to try to make a federal case out of their local dispute. In the septic tank case, plaintiffs claimed that the noxious seepage infringed their rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and thereby violated 42 U.S.C. sec. 1983. The plaintiff in the hog farm dispute likewise saw a section 1983 violation in her allegedly retaliatory eviction. The zoning appeal plaintiffs relied on a variety of federal environmental laws, including the National Environmental Policy Act, the Coastal Zone Management Act, the Refuse Act of 1899, and the Safe Drinking Water Act. As might be expected, the courts were no more impressed with these claims than they had been with the citizen suit counts.

57. 756 F.2d 392 (5th Cir. 1985).

58. *Id*. at 393-94. Later in its opinion, the court notes:

> If Section 1365 were interpreted as permitting citizen suits for civil penalities for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be an incentive to bring suit under the Act rather than in state court.

Id. at 396.

59. *See* text accompanying notes 201-202, *infra*.

60. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 14 E.L.R. 20686 (D.R.I. 1984).

61. *See* Student Public Interest Research Group of New Jersey, Inc. v. Anchor Thread Co., 22 E.R.C. 1150 (D. N.J. 1984); Sierra Club v. Raytheon Co., LEXIS Slip op. Civ. Ac. No. 84-1785-MA (D. Mass. Oct. 26, 1984); Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs, Civ. Ac. No. 84-

1087; (D. N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co, Civil 83-2068; (D. N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. National Starch and Chemical Corp., Civil 84-1119, (D. N.J. 1985); Sierra Club v. Simkins Industries, Inc., Civ. No. HM84-4018, 4019, 4020, (D. Md. 1985); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F.Supp. 1474, (D. N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp., 23 E.R.C. 1338 (D. N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 15 ELR 20294 (D. N.J. 1985); Fishel v. Westinghouse Electric Corp., Civ. Ac. No. 85-0216 (M.D. Pa 1985); Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 22 E.R.C. 2121 (E.D. Va. 1985). In Friends of the Earth v. Facet Enterprises, Inc., [illegible] E.L.R. 20106 (W.D.N.Y. 1984), the court held over for trial a claim of continuing violation.

?. Since development projects have their greatest impact on local residents, it is not surprising to find that local environmental and sportsmen's organizations are the most frequent plaintiffs in these cases: 6 of the 15 Water cases, and 10 of 23 Air suits, featured such groups as the "lead" or named plaintiff. Another three cases (two in Air, one in Water) had local citizen groups or property owners as plaintiffs, and individuals brought another half-dozen of the stop development actions. National environmental organizations brought only three of the Air cases and two of the Water actions, with the remainder (6 Air, 2 Water) falling to state, regional, or local government plaintiffs. The defendants in these cases were usually a combination of government agencies and developers.

Many of the cases have multiple plaintiffs, and so these counts of "lead" organizations may not give a completely accurate picture of the scope of participation by different groups. However, trying to count all organizations involved would also introduce some distortions, because court opinions do not always identify all of the parties in a complex action. Moreover, it seems clear that many of these parties are purely nominal plaintiffs or defendants, who take no significant part in the management of the litigation; yet it is not possible to make this kind of distinction from the case reports. Counts of lead plaintiffs therefore appear to be the most useful (albeit rough) means of calculating participation by different kinds of organizations.

63. South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978). This issue was ultimately resolved adversely to the environmental plaintiffs in an action-forcing citizen suit, National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (EPA does not have a nondiscretionary duty to regulate dams as point sources).

64. California Tahoe Regional Planning Agency v. Harrah's

Corp., 509 F.Supp. 753 (D.Nev. 1981).

65. As the name suggests, action-forcing cases tend to be brought by private organizations against governmental defendants. National environmental organizations were plaintiffs in 3 of 5 CWA cases, and 8 of 17 CAA suits. Local environmental or citizen groups accounted for the remaining 2 CWA cases, and another 5 CAA citizen suits. In addition, 3 state or local government entities brought action-forcing cases under the CAA. All of the defendants in the CWA cases were EPA administrators. In the CAA cases, there were 9 federal defendants, 6 state defendants, and 2 combinations of federal and state defendants.

66. Friends of the Earth v. EPA, 499 F.2d 1118 (2d Cir. 1974); Friends of the Earth v. Carey, 401 F.Supp. 1386 (S.D.N.Y. 1975), 422 F.Supp. 638 (S.D.N.Y. 1976), 535 F.2d 165 (2d Cir. 1976), 552 F.2d 25 (2d Cir. 1977).

67. Delaware Citizens' Council for Clean Air v. Pennsylvania, 533 F.Supp. 869 (E.D. Pa. 1982), 674 F.2d 976 (3d Cir. 1982), 674 F.2d 976 (3d Cir. 1982), 551 F.Supp. 827 (E.D. Pa. 1982).

68. NRDC v. Train, 545 F.2d 320 (2d Cir. 1976) (lead standard NAAQS); New York v. Gorsuch, 554 F.Supp. 1060 (S.D.N.Y. 1983) (organic arsenic); Sierra Club v. Gorsuch, 551 F.Supp. 785 (N.D. Cal. 1982) (radionuclides).

69. Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) (Nuclear Regulatory Commission has primary authority over radioactive effluents).

70. National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (EPA does not have nondiscretionary duty to regulate dams as a point source under the CWA).

71. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977) (Administrator does not have mandatory duty to issue an administrative order against violator, since this would be an exercise in futility if EPA does not plan to bring suit).

72. The difference between them is that the "stop development" case is an attack on a *proposed* project, while the pollution abatement action is an attempt to terminate *ongoing* pollution.

73. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom.* General Public Utilities Corp. v. *Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).

74. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

75. Township of Long Beach v. City of New York, 445 F.Supp. 1203 (D. N.J. 1978).

76. Montgomery Environmental Coalition v. Fri, 366 F.Supp. 261 (D. D.C. 1973); Montgomery Environmental Coalition v. Washington Suburban Sanitary Commission, 607 F.2d 378 (D.C. Cir. 1979); see also Montgomery Environmental Coalition v. Costle, 646 F.2d 568 (D.C. Cir. 1980); District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980); Montgomery Environmental Coalition v. Costle, 646 F.2d 595 (D.C. Cir. 1981).

77. Nineteen reported decisions under the Water Act were classified as "abate pollution" actions; however 5 of those opinions were rendered at different stages of continuing controversies. Thus, the actual number of controversies represented is fourteen. Only three cases were found under the Air Act, and one of them also appeared on the water list.

78. The number of reported private enforcement cases was comparable under the Air Act--fourteen in all--but the patterns were less clear. The number of decisions did not increase dramatically over time as in the Water Act cases, and the types of plaintiffs and defendants were more mixed, with a scattering of state and federal agencies appearing as both plaintiffs and defendants. Plaintiffs were successful in eight of the fourteen cases, including some instances where they succeeded only in surviving a motion to dismiss.

79. E.g., United States v. Ketchikan Pulp Co., 74 F.R.D. 104 (D.Alas. 1977), 430 F. Supp. 83 (D.Alas. 1977); United States v. Hooker Chemical & Plastics Corp., 540 F.Supp. 1067 (W.D.N.Y., 1982). In United States v. Hooker Chemicals & Plastics Corp. (S-Area), 749 F.2d 968, 985 (2d Cir. 1968), the court described the burden on an intervenor to show inadequate government representation in an enforcement case:

> It is not enough that the applicant would insist on more elaborate pre-trial or pre-settlement procedures or press for more drastic relief, particularly where the sovereign's interest is in securing preventive relief of the same general sort as the applicant. While it would be going too far to require an applicant to demonstrate collusion, there must be, at least in cases where the applicant has no right to sue, ... a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant.

80. The EPA's Water program office in Washington maintains files on the notices it receives; however, this data system is probably incomplete due to the fact that regional offices and

other units at headquarters may recieve the notice of citizen suit, and fail to forward it to the central data collection point. In addition, EPA would not necessarily receive notice of settlements in private enforcement actions, especially if the settlement was not embodied in a court decree.

81. Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (September 1984) (hereafter cited as "ELI Report"). For other general discussions of citizen suits under environmental statutes, *see* Miller, *Private Enforcement of Federal Pollution Control Laws*, Parts I-III, 13 E.L.R. 10309 (1983), 14 E.L.R. 10067, 10407 (1984-85); Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 Denver L. J. 553 (1983); Schwartz & Hakett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 Nat. Res. Lawyer 327 (1984); Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 Harv. Env. L. Rev. 23 (1985).

82. ELI's data base begins before the current wave of citizen suits began. The following table, taken from ELI's data (*id.* at III-D, Fig. D), shows the pattern of activity under the Clean Air and Clean Water Acts:

CITIZEN ENFORCEMENT ACTIVITY UNDER
CLEAN AIR AND WATER ACTS, 1978-1983

	CLEAN WATER ACT		CLEAN AIR ACT	
	Notices	Suits	Notices	Suits
1978	0	1	0	4
1979	1	8	4	11
1980	2	4	13	7
1981	0	6	4	5
1982	3	16	1	4
1983	46	62	3	0
1984 1st 4 mos	61	26	1	0

These figures may slightly overstate the increase in citizen suits, since anecdotal reports suggest that plaintiff organizations are having difficulty finding sufficient resources to sustain the 1983-84 rate of case generation.

83. For present pruposes, a "suit" is any controversy that has progressed to the mailing of a "60-day notice letter," which as previously indicated is a legal prerequisite to filing an action in court.

84. ELI Report at vi, III-5. There is a slight discrepancy between these two references: at p. vi, the Report indicates that 162 CWA cases were brought by national and regional environmental groups, while the table on p. III-5 indicates 179 CWA notice letters from these organizations. For purposes of the

figures given in the text here, the latter table was used.

85. See generally J. Lash, A Season of Spoils (1984).

86. The following figures are taken from the ELI Report, at III-27:

CASE REFERRALS FROM EPA TO DEPARTMENT OF JUSTICE
BY PROGRAM AND FISCAL YEAR

FY	WATER	Air (Stationary)	Air (Mobile)	Hazardous Waste	Totals
1977	93	12	38	0	143
1978	137	68	55	2	262
1979	81	103	46	9	239
1980	55	77	20	52	204
1981	36	51	14	14	115
1982	46	31	4	27	108
1983	56	61	7	31	155

Referrals within the agency from regional offices to headquarters experienced a comparable decline; see id. at III-24. As noted below, the figures returned to pre-Gorsuch levels under the Ruckelshaus Administration, which put a high premium on raising them.

87. E.g., W. Drayton and Environmental Safety's Facts Committee, America's Toxic Protection Gap 6 (paper ed. 1984):

> After remaining between 4.64 to 5.16 billion (constant 1972) dollars from 1972 through 1980, business's planned expenditures for 1983 dropped to between 3.27 and 3.40 billion dollars, according to the Commerce Department's Annual Survey of Current Business. This sharp drop in control equipment investment implies a sharper fall in operating compliance because (1) it is much easier to determine whether control equipment is present than it is to ensure that it is operated and maintained properly and (2) it generally costs much more to operate than to purchase. Moreover, if America were in fact beginning to control toxics in the early 1980s as the laws require, expenditures should have been increasing sharply during this period.

88. U.S. General Accounting Office, Wastewater Dischargers Are Not Complying with EPA Pollution Control Permits i (RCED 84-53, Dec. 2, 1983).

89. This was the subtitle of the report by W. Drayton and Environmental Safety's Facts Committee, _supra_ note 87. The report further noted:

> In the long run the massive loss of voluntary compliance is the most harmful effect of this failure to implement the law in the 1980s. Once firms lose confidence that their competitors are complying, they too will stop. Regaining the confidence of hundreds of thousands of business operators is an enormously difficult, very expensive, and painfully slow undertaking. ...The nation's small force of environmental safety officers, armed with the key fairness argument that everyone should do their share, could deal effectively with a handful of noncompliers. Asking them to deal with almost everyone, especially with the fairness argument turned against them, is to ask the impossible and thereby insure failure.

90. At this time, the data to support the analysis in this paragraph is more impressionistic than systematic. The authors are engaged in ongoing research designed to explore these issues more fully.

91. J. Quarles, Cleaning Up America 36 (1976).

92. _Id_. at 36-57.

93. _See generally_ Quarles, _supra_ note 91, at 37-57. _See also_ Council on Environmental Quality, Environmental Quality 119 (1972), noting that the Refuse Act "has been increasingly used for water pollution control enforcement," with 81 criminal actions and 52 civil suits filed during the first 6 months of FY 1972.

94. For example, EPA was criticized during its early years for the "thirty-five polluter episode" in which the agency held a press conference to announce that it was referring 35 cases against major industries to the Justice Department for criminal prosecution. Justice eventually concluded that only three of these cases were worthy of criminal prosecution. Gellhorn, _Adverse Publicity by Administrative Agencies_, 3 A.C.U.S. 67, 87-89 (1973).

95. Quarles, _supra_ note 91 at 50-51, observes:

> There was one curious feature of the early EPA enforcement program: almost the entire emphasis was placed on beginning the actions. ... Itwas almost as though the mere fact of

> filing suit would end the problem once and for all, and if only we could sue all the polluters ... ourenvironmental problems would be over. The difficulties of pursuing an action through completion -- achieving an actual cleanup program -- seemed scarcely to be noticed, especially at first.

96. E.g., Id. at 53: "The basic weakness of the early enforcement actions was that they were being initiated in areas where effective standards and pollution control requirements themselves had not yet been set. However aggressive the enforcement program, it could not be effective if it tried to establish these basic requirements by suing polluters one at a time." The passage in 1972 of the Federal Water Pollution Control Act compelled EPA to develop an elaborate infrastructure of permits, guidelines, and standards as a predicate for enforcement actions. See Council on Environmental Quality, Environmental Quality 66-68 (1975) (reporting numbers and types of water enforcement actions brought from 1967-75, and noting that the 1972 amendments "created an enforcement hiatus--no polluter who had applied for a permit under the FWPCA provisions could be prosecuted before December 31, 1974").

97. Because it is strikingly similar to William Ruckelshaus' description of his 1983 difficulties in arousing the EPA bureaucracy to more vigorous enforcement, see text accompanying note 113, infra, John Quarles' account of bureaucratic reluctance to prosecute during the early days of EPA, supra note 91 at 47-48, is worth quoting at some length:

> Three months after EPA was created, Ruckelshaus summoned the regional directors of the water pollution program to Washington and told them to push ahead aggressively with enforcement cases. When the months that followed produced little action, I was puzzled. Slowly I realized that the biggest factor in the delay was simply the ingrained attitude of most employees in the agency.
>
> Prior to EPA's creation the federal pollution control programs had focused on research, planning, grants, and technical assistance, and few of the people doing that work had any taste or training for the rough and tumble of enforcement. They felt inhibited by the opposition of their state agency counterparts, who resented the intrusion of federal officials. ... Because he knew the action would be attacked by the polluter and criticized by the state officials, he was tempted to forget the whole

> business ... .
>
> ...[U]ntil each regional office became experienced, the fear remained that political pressure would be used to block us and that the regional officer who had taken the initiative would be left out on a limb.

98. *Id*. at 50.

99. M. Brown, *EPA Enforcement--Past, Present, and Future*, Environmental Forum, May, 1984, at 13.

100. *Id.*

101. *Id*. at 15.

102. *See generally* Drayton, *Economic Law Enforcement*, 4 Harv. Env. L.Rev. 1 (1980).

103. Assessment and Collection of Noncompliance Penalties by EPA, 40 CFR Part 66, 45 Fed.Reg. 50110 (July 28, 1980); EPA Approval of State Noncompliance Penalty Program, 40 CFR Part 67, 45 Fed.Reg. 50117 (July 28, 1980).

104. *More Effective Action by the Environmental Protection Agency Needed to Enforce Industrial Compliance With Water Pollution Control Discharge Permits* (RCED-78-182, Oct. 17, 1978). Two years later, GAO issued some equally stinging criticism of EPA's management of the construction grant program which was intended to clean up the effluents of municipal sewage treatment plants. *Costly Wastewater Treatment Plants Fail to Perform as Expected* (Nov. 14, 1980).

105. J. Lash, A Season of Spoils 46-47 (1984).

106. BNA Env. Rptr. Aug. 19, 1983, p. 644.

107. Alm, *EPA's Management Approach to Enforcement*, The Environmental Forum, Sept. 1984, p. 7.

108. *Changes in EPA Statutory Authorities Recommended in Draft Report on Enforcement*, BNA Env. Rptr. Sept. 21, 1984, pp. 794-95; *see also id.* at 809-823.

109. Alm, *supra* note 107, at 10.

110. *See* text accompanying notes 172-195, *infra*.

111. *Transcript of William D. Ruckelshaus' Remarks, EPA National Compliance and Enforcement Conference*, The Environmental Forum, April 1984, pp. 14, 16-17.

112. See, e.g., Stanfield, Ruckelshaus Casts EPA as "Gorilla" in States' Enforcement Closet, National Journal, May 26, 1984, p. 1034.

113. Transcript, supra note 111, at 15-17.

114. Interview subjects varied in their estimations of how long private enforcers would have to play this kind of role. One suggested that the program might be terminated in ten years or so if the groups were successful in altering the behavior of poluting industries, while others saw a continuing process of permit revisions and subsequent enforcement actions for the indefinite future. All seemed to agree, however, that a long-term presence of citizen enforcers was desirable, if not essential.

115. The seminal article is, of course, Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). See also Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L.Rev. 387 (1981); S. Cheung, The Myth of Social Cost (1980).

116. Thus, economists generally favor taxes on harmful activities like pollution instead of command-and-control regulation on the ground that taxes target the incentive structure of regulated firms more directly and efficiently than general regulations. See, e.g., A Kneese & C. Schultze, Pollution, Prices, and Public Policy (1975).

117. For a summary of statutory constraints on administrative cost-benefit analysis in rulemaking, see L. Lave, The Strategy of Social Regulation: Decision Frameworks for Policy 8-28 (1981). Political constraints on the Environmental Protection Agency are discussed in Marcus, Environmental Protection Agency, in J. Wilson, ed., The Politics of Regulation 267 (1980); J. Lash, A Season of Spoils (1984).

118. As used here, "rulemaking costs" would include the information costs associated with developing and evaluating alternative regulatory actions.

119. Veljanovski, The Economics of Regulatory Enforcement, in K. Hawkins & J. Thomas, eds., Enforcing Regulation (1984). For a more technical discussion, see Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Studies 257 (1974).

120. For much the same reasons, the regulations may, of course, be underinclusive and fail to prohibit conduct that imposes inefficiently high social costs; see Veljanovski, supra note 119. However, few economists have devoted much consideration to this possibility in the recent writings on regulatory enforcement. Judging from the amount of attention

given to it, overinclusiveness seems to be considered a more pressing threat to efficiency.

121. Diver, *A Theory of Regulatory Enforcement*, 28 Public Policy 257, 262 (1980). A slightly different formulation is used in Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 Geo. L.J. 1075, 1076 (1980), paraphrasing Gary Becker: "In essence, three types of cost must be minimized: The costs resulting from the harmful conduct subject to regulation, the process costs associated with apprehending and determining the guilt of offenders, and the punishment costs associated with imposing a sanction upon the offender."

122. *See, e.g.*, Diver, *supra* note 121; Beeker, The Economic Approach to Human Behavior, 39 (1976).

123. *E.g.*, Diver, *supra* note 121, at 264: "Both elements of that calculation--identifying the class of violators and measuring the social harm prevented--depend on highly unreliable estimates and fragile causal assumptions." *Cf.* Schuck, *Book Review*, 90 Yale L.J. 702, 711 (1981).

124. For example, Viscusi & Zeckhauser, *Optimal Standards With Incomplete Enforcement*, 27 Public Policy 437, 444 (1979), argues that raising regulatory standards will not necessarily raise quality (such as environmental quality) because firms confronted with a more stringent standard will have different cost-benefit relationships to the new standard:

> Standards influence the payoffs associated with different quality choices and consequently affect the behavior of the firms. The exact nautre of the outcome in terms of the distribution of quality levels achieved hinges on the shape of these payoff curves, the level of the standard, and the distribution of enterprise characteristics. There is no general relationship between the stringency of the standard and the degree of improvement in quality provided; thus raising the standard may either raise or lower average quality.

125. *See, e.g.*, Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 Geo. L.J. 1131 (1980).

126. Mashaw, "Private Enforcement of Public Regulatory Provisions: The 'Citizens Suit,'" Jan. 8, 1975, pp. 12-14 (Report to the Committee on Compliance and Enforcement Proceedings of the Administrative Conference of the United States).

127. E.g., Regulation: The Confusion of Means and Ends, in G. Stigler, The Citizen and the State: Essays on Regulation (paper ed. 1975).

128. Landes & Posner, The Private Enforcement of Law, 4 J. Legal Studies 1 (1975); Polinsky, Private Versus Public Enforcement of Fines, 9 J. Legal Studies 105 (1980).

129. The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, replaced a 1948 Federal Statute which was widely regarded as ineffective. One of the principal shortcomings of the older statute was its primary reliance on stream quality standards rather than discharge limits (which made it necessary to show that a particular discharger's effluent was adversely affecting water quality); in addition, its enforcement system was generally cumbersome and ineffectual. See generally Barry, supra note 17.

130. Section 304(b) of the Act, 33 U.S.C. sec. 1314(b), directs the Administrator to promulgate effluent limitation guidelines. The guidelines are keyed to the Act's two-stage imposition of technological controls. From the effective date of the Act's permit requirement until 1977, the designated control technology was "best practicable control technology currently available," usually shortened to "BPT" [Section 301(b)(1)(A), 33 U.S.C. 1311(b)(1)(A)]. For the second stage, which was to be achieved by 1983, dischargers are required to meet a somewhat higher standard--"best available technology economically achievable," which is variously abbreviated to "BATEA" or "BAT" [Section 301(b)(2)(A), 33 U.S.C. 1311(b)(2)(A)]. As might be expected, there has been substanial slippage in this timetable over the years, and most of the permits discussed in this study would have been issued under the BPT guidelines--if indeed there were any guidelines applicable.

131. NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974).

132. See, e.g., cases cited in American Petroleum Institute v. EPA, 540 F.2d 1023, 1027 (10th Cir. 1976).

133. American Petroleum Institute v. EPA, 661 F.2d 340, 347 n.23 (5th Cir. 1981); see also Marathon Oil Co. v. EPA, 564 F.2d 1253, 1272-73 (9th Cir. 1977).

134. See note 130, supra.

135. In E. I. Dupont de Nemours & Co. v. Train, 430 U.S. 112 (1977), the Court held that the Clean Water Act empowered EPA to issue not only effluent limitation guidelines for officials writing individual discharge permits, but also binding regulations directly limiting discharges on a generic basis--"so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its

1977 limitations." 430 U.S. at 128. *See also* cases cited note 133, *supra*.

136. EPA's authority to issue "fundamentally different factor" variances was upheld in Chemical Manufacturers' Ass'n v. Natural Resources Defense Council, In., 105 S.Ct. 1102 (1985).

137. *See generally* text accompanying notes 105-113, *supra*; Anon., *Ruckelshaus Worried Citizen Suits Will Reveal Poor Enforcement Record*, Inside EPA, May 11, 1984, p. 1.

138. J. Wilson, The Politics of Regulation 374-82 (1980).

139. *E.g.*, C. Stone, Where the Law Ends: The Social Control of Corporate Behavior (1975); Stone, *Large Organizations and the Law at the Pass: Toward a General Theory of Compliance Strategy*, 1981 Wisc. L.Rev. 861.

140. E. Bardach & R. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness (1982); *see also* K. Hawkins, Envirnment and Enforcement: Regulation and the Social Definition of Pollution (1984).

141. Kagan & Scholz, The "Criminology of the Corporation" and Regulatory Enforcement Strategies, in K. Hawkins & J. Thomas, eds., Enforcing Regulation (1984).

142. Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 22 E.R.C. 2121 (E.D. Va. 1985), *appeal pending*.

143. *Id*. at 2138. *See also* United States v. Metropolitan District Commission, LEXIS Slip op. Civ. Ac. No. 85-0489-MA at n.9 (D. Mass. Sept. 5, 1985), involving consolidated public and private enforcement actions, where the court expressed dismay at a sewer district's continuing failure to make progress toward compliance with simple sewage treatment requirements that had been in effect for nearly a decade:

> As I delve into the record in this case, it becomes more and more incomprehensible to me that the defendants have continually discharged thesludge back into the Harbor daily. By doing so, they virtually eliminate any benefit the initial treatment steps may have had. This simply amounts to separating water from filth, and pumping both back into the Harbor.

The court rejected a request by the sewer district and EPA for more time to negotiate a settlement of the case, noting: "I simply do not have any adequate assurance that the community's federally guaranteed right to a clean harbor will be protected if the parties are left to their own devices."

144. The classic statement of this equal treatment rationale is of course Kenneth Culp Davis' Discretionary Justice (1969).

145. At least, this seems to be the dominant theory today. Inconsistency might be defended on deterrence grounds. If a few violators were arbitrarily selected for severe punishment, the resulting uncertainty might increase general deterrence, at least if substantial numbers of violators were risk-averse. Another theoretical justification for inconsistency, especially in a national environmental program like air or water pollution, would be the desirability of tailoring enforcement to local needs and desires. Thus it might be argued that if New Jersey's voters prefer job preservation over cleaning up the environment, and New York's voters have the opposite preference, those preferences ought to be reflected in enforcement policy, even if this produces inconsistent outcomes. (This assumes that the legal structure has not created formal consistency by including regional location as a variable in the penalty calculus.) The federal environmental programs are mostly designed to establish uniform national standards; but there still may be some room to accomodate differing state preferences, at least where those preferences are for more stringent controls than the federal programs require.

146. 33 U.S.C. sec. 1365(b)(1)(A).

147. 33 U.S.C. sec. 1365(b)(1)(B).

148. The Senate Report on the CWA states: "The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation." S.Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3745. The Act provides that "any citizen may intervene as a matter of right" in a government enforcement action, 33 U.S.C. sec. 1365(b)(1)(B).

149. In 1983, EPA negotiated a memorandum of understanding with the Justice Department to permit "direct referrals" of certain kinds of enforcement cases from EPA regional offices to Justice's Lands and Natural Resources Division, thereby cutting out EPA headquarters review. However, the categories of Water Act cases thus exempted have not figured prominently in the current wave of citizen suits: discharges without a permit; violations by minor industrial dischargers; collection of penalties stipulated in consent decrees; and collection of administrative spill penalties. All other referrals have to be reviewed in EPA headquarters both by the Office of Enforcement and Compliance Monitoring, and by the program office. The direct referral system was established for a one year trial period; however, no information has been found about the termination or continuation of the program after September of 1984, when it was

due to expire. Letter from Alvin L. Alm, Deputy Administrator, USEPA, to F. Henry Habicht, II, Acting Assistant Attorney General, Lands and Natural Resources Division, USDOJ, Sept. 29, 1983.

150. This is more true for the current wave of citizen suits, which are largely the product of file searches and review of agency documents, than it is for the long-running local controversies that one interviewee termed "blood feuds." In the latter disputes, local spokespersons have typically been dealing with (or perhaps attacking) the recalcitrant discharger for an extended period. The issues in the debate are well known in the local area. When the case is generated from a review of file documents, however, it may be that local members of the plaintiff organization have not been in contact with the discharger. Indeed, it may be difficult to find local people who are willing and able to take on this responsibility. Some of the lawyers of the plaintiff organizations feel that it would be improper for them to make contact with the alleged violator at a time when the matter seems headed for litigation; in addition, many of them probably have little time to do so, given the caseloads of citizen suits and other matters pending in their offices.

151. Unfortunately, we have no good data on the frequency of these agency/party contacts.

152. _E.g._, Proffit v. Commissioners, Township of Bristol, 754 F.2d 504, 506 (3d Cir. 1985), and cases cited there. The cases in which notice defects were held to be jurisdictional bars to a citizen suit were mostly actions in which plaintiffs were trying to bring trivial or inappropriate claims under the private enforcement provision. Two were actions arising out of grants or contracts for the planning or construction of sewage treatment plants (Concerned Citizens of Bushkill Twp. v. Costle, 468 F.Supp. 21 (E.D. Pa. 1978); Ventnor City v. Fri, 6 E.R.C. 2104 (D. N.J. 1974)); one was an attempt to recover damages through an implied right of private action under the citizen suit provision (City of Evansville v. Kentucky Liquid Recycling Inc., 604 F.2d 1008 (7th Cir. 1979), _cert. denied sub nom._ Louisville & Jefferson Cty. Metro. Sewer Dist. v. City of Evansville, 444 U.S. 1025 (1980)).

153. 761 F.2d 311 (6th Cir. 1985).

154. _Id_. at 317.

155. _Id_.

156. _See, e.g._, Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories, Civil Action No. 84-1087 (Slip op. at 6-7) (D.N.J. Aug. 8, 1985) (failure of one plaintiff organization to give notice does not require that they be dismissed from the action when other plaintiff has given

adequate notice); Sierra Club v. Raytheon Co., LEXIS Slip op. Civ. Ac. No. 84-1785-MA (D. Mass. Oct. 26, 1984) (notice sufficient when sent to defendant's President and Plant Supervisor, but not to Registered Agent as provided in EPA regulations); Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440, 450-51 (D. Md. 1985) (defense claim that a second notice had to be given for violations occurring after initial notice rejected because "[i]t would be incongruous with [the plaintiffs'] right to sue for a continuing violation to conclude that specific incidents of non-compliance within the sixty day notice period could not be sued upon because of a lack of statutory notice"); Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F.Supp. 1394, 1396 (D. N.J. 1985) (failure of one of three plaintiff organizations to give notice does not require dismissal of that party from suit).

157. 33 U.S.C. sec. 1365(b)(1)(B) (Clean Water Act).

158. In the situation where a discharger violates an EPA administrative order under the Clean Water Act (for example, by failing to meet a compliance schedule for installing a treatment system), the agency would have the option of going to court for penalties on the underlying violations. In this situation, the defendant may raise defenses of laches, waiver, or estoppel against the government, citing the administrative order as government acquiescence in prior violations. *Compare* United States v. Amoco Oil Co., 580 F.Supp. 1042 (W.D. Mo. 1984) (no defense of laches or estoppel against the government) *with* United States v. Del Monte de Puerto Rico, Inc., 586 F.2d 870 (1st Cir. 1978) (defendant's claim that EPA waived compliance by approving a schedule change held sufficient to prevent summary judgment on penalty for Clean Water Act violations).

159. 592 F.2d 215 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979).

160. Friends of the Earth v. Consolidated Rail Corp., slip op. Docket No. 85-7033 (2d Cir. July 19, 1985).

161. *E.g.*, SPIRG v. Georgia-Pacific Corp., 23 E.R.C. 1338 (D.N.J. 1985) (consent settlement with EPA and state agency no bar to citizen suit under *Bradford* test, even though settlement was filed in court); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F.Supp. 1479, 1482-83 (D.N.J. 1985) (EPA administrative order under CWA does not meet *Baughman* test); Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F.Supp. 1394 (D.N.J. 1985) (EPA order under CWA no bar to citizen suit because agency lacks sanctioning power, and citizens have no opportunity to participate); Sierra Club v. Simkins Industries, Inc., LEXIS Slip op. Civil No. HM84-4018 (D.Md. June 18, 1985) (state administrative proceeding not equivalent to a court under

Baughman because state agency lacks "the full remedial powers inherent to traditional judicial courts"); Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co., Slip op., Civil 83-2068 (JWB) (D.N.J. Nov. 6, 1985) (EPA administrative order under CWA not equivalent to a court); Proffitt v. Commissioners, Township of Bristol, 754 F.2d 504, 507 (3d Cir. 1985) ("Plainly, EPA's compliance order lacks the indicia of a 'court action' enunciated in *Baughman*, particularly the right of citizens to intervene ... ."); Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131, 1135-39 (3d Cir. 1985) (lack of public participation in administrative enforcement proceedings is a relevant but not determinative factor; EPA administrative order under CWA not equivalent to court action); Sierra Club v. SCM Corp., 572 F.Supp. 828 (W.D.N.Y. 1983); Love v. New York State Department of Environmental Conservation, 529 F.Supp. 832, 844 (S.D.N.Y. 1981) (State consent order held no bar to citizen suit, primarily because state prosecution not considered diligent. Court also notes: "Furthermore, no hearings were ever held and it does not appear that the plaintiff had the opportunity to intervene."). *See also* United States v. Earth Sciences, Inc., 599 F.2d 368, 375-76 (10th Cir. 1979) (EPA may bring penalty action against CWA violator who is already subject to administrative order, without showing that order was violated).

162. Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, 579 F.Supp. 1528, 1535-37 (D.N.J. 1984).

163. For example, in Love v. New York State Department of Environmental Conservation, 529 F.Supp. 832, 844 (S.D.N.Y. 1981), the court brushed aside a diligent prosecution defense with the conclusory statement, "It does not appear that [the state agency] enforced the environmental laws to the fullest extent possible." If the diligence test turned on whether the agency had enforced against a particular violator "to the fullest extent possible," then the diligent prosecution exemption would become a virtual nullity. An alternative holding in Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co., Civil 83-2068 (JWB) (slip op. at 16) (D.N.J. Nov. 6, 1985), looked to penalties and deterrence theory in determining diligence. It accepted plaintiffs' argument that state agency prosecution had not been diligent because the agency had not imposed any penalties during an eight-year running despite over compliance. In making this determination, the court cited EPA's 1984 penalty policy for the proposition that money penalties "are often necessary even if the underlying violation has been corrected, to deter future violations, and to restore economic equity to other regulated parties." However, it is not clear from the opinion how much latitude a state agency (or, for that matter, EPA itself) would have to move from a penal enforcement policy to a voluntary compliance policy that emphasized cooperation and negotiation. Even under a strict deterrence

rationale, presumably an agency could "plea bargain" at least some cases by forgiving some violations in exchange for a consent settlement. Apart from extreme cases, it is difficult to see how a reviewing court could second-guess the agency decision to accept a voluntary compliance agreement without venturing outside the bounds of its competence.

164. 105 S.Ct. 1649, 1656 (1985).

165. It is true that the diligence determination in a citizen suit does not involve as direct a challenge to agency priority-setting as the kind of judicial review attempted in *Chaney*, since the court determination of nondiligence in a *citizen* suit would simply permit the private action to go forward, leaving the agency otherwise free to set and execute its own priorities. But there remains the problem of how the court would find or develop standards to assess the administrative decision. Once an agency says, "This is the most we can do on this particular case, given the resources we have and the other problems that require our attention," it seems difficult at best for a reviewing court to decide whether the resources invested by the agency were enough. However, it may be possible to find judicially manageable standards for cases of widespread or systematic failures to enforce; *see generally* Sunstein, *Reviewing Agency Inaction After* Heckler *v. Chaney*, 52 U. Chi. L. Rev. 653 (1985).

166. Hazardous and Solid Waste Amendments of 1984, sec. 401(d), 98 Stat. 3221, 3269-70, amending section 7002(b)(2)(A) of the Solid Waste Disposal Act to bar suit for 90 days "after the plaintiff has given notice of the endangerment."

167. For example, Eugene Bardach and Robert Kagan in Going By the Book (paper ed. 1982) argue that overly rigid, "by-the-book" enforcement can demoralize and impede the "trusteeship stratum" of professionals, technicians and managers who are responsible within the firm for achieving compliance with environmental laws. They conclude that "the social responsibility of regulators, in the end, must be not simply to impose controls, but to activate and draw upon the conscience and the talents of those they seek to regulate." *Id.* at 323. This analysis has been sharply attacked, *see* Abel, *Risk as an Arena of Struggle*, 83 Mich. L.Rev. 772 (1985), and we do not mean to suggest that the Bardach and Kagan analysis is factually correct in the field of regulation discussed in this Article. At present, we lack sufficient data to accept or reject its applicability to citizen environmental suits. But it does have enough plausibility to raise concerns about the potentially destructive effects of overly rigid enforcement.

168. One legal basis for making this kind of presentation is the standing doctrine, which defendants may use to show that the discharges in question caused only negligible injuries to

persons or to uses of the waterway. *See* text accompanying notes 234-268 *infra*. Similarly, defendants have argued (thus far without success) that courts should recognize a *de minimis* defense. *See, e.g.*, Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co., Civil No. 83-2068 (D.N.J. Nov. 6, 1985); Student Public Interest Research Group of New Jersey, Inc. v. National Starch & Chemical Corp., Civil No. 84-1119 (D.N.J. Oct. 15, 1985); Student Public Interest Group of New Jersey, Inc. v. AT&T Bell Labs, Civ. Ac. No. 84-1087 (D.N.J. Aug. 8, 1985). Defendants may assert that prior government enforcement activities constitute waiver, estoppel, or laches barring private actions relating to the same discharges, but these defenses have also proved unsuccessful. *See, e.g.*, Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp., 23 E.R.C. 1338 (D.N.J. 1985); Sierra Club v. C.G. Manufacturing, Inc., LEXIS Slip op. Civ. Ac. No. 84-1784-Z (D. Mass. Apr. 12, 1985); United States v. Metropolitan District Commission, LEXIS slip op. Civ. Ac. No. 85-0489-MA (D. Mass. Sept. 5, 1985); Student Public Interest Research Group of New Jersey, Inc. v. Anchor Thread Co., 22 E.R.C. 1150 (D.N.J., 1984). The primary jurisdiction doctrine, which would require the court to defer to pending proceedings, has also been used by defendants, and occasionally this argument has prevailed. *Compare* Montgomery Environmental Coalition v. Washington Suburban Sanitary Commission, 607 F.2d 378 (D.C. Cir. 1979) (primary jurisdiction doctrine bars injunction against polluting authorities while permit renewal is pending) *with* Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F.Supp. 1479 (D.N.J. 1985) *and* Connecticut Fund for the Environment v. The Job Plating Co., Inc., LEXIS Slip op. H83-963 JAC (D.Conn. Sept. 17, 1985) (primary jurisdiction argument rejected). A related argument was made in Maryland Waste Coalition v. SCM Corp., LEXIS Slip op. Civ. Ac. No. R-85-1067 (D. Md. Sept. 4, 1985), where the defendant argued that the federal court should defer to a pending state court proceeding under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). This argument was rejected because the defendant had failed to show beyond "any substantial doubt" that the state proceeding would provide a complete and prompt resolution of the issues.

169. *See, e.g.*, Sierra Club v. SCM Corp., 572 F.Supp. 828, 831 (W.D.N.Y. 1983) (state environmental agency not an indispensable party because plaintiff had no cause of action against it); Nunam Kitlutsisti v. Arco Alaska, Inc., 592 F.Supp. 832 (D. Alas. 1984) (EPA not indispensable party to private enforcement action); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F.Supp. 1479, 1484 (D.N.J. 1985) (EPA amd state agency not indispensable parties).

In 1984, the Chemical Manufacturers' Association wrote a letter to EPA, requesting the agency to make available for testimony in CWA citizen suits the personnel who had participated in drafting the permits, so that industry could show that there had been informal understandings that some types of violations would not be penalized. Letter from David F. Zoll, Vice President and General Counsel, Chemical Manufacturers' Association, to Jack Ravan, Assistant Administrator for Water, USEPA, June 18, 1984.

170. The resource problem is particularly difficult in the current wave of citizen suits, since the bulk of private enforcement litigation is concentrated in a few heavily industrialized parts of the country. Thus, the burden of responding to citizen suits would fall disproportionately on three or four of EPA's regional offices.

171. The enforcement structure of the Clean Water Act is described as follows in United States v. Cargill, Inc., 508 F.Supp. 734, 740 (D.Del. 1980):

> The enforcement provision of the Act sets up a ... system, giving primary responsibility to the state with an approved NPDES [discharge permit] system but reposing significant authority in EPA ... to step in itself in appropriate situations. ...[A]s an initial matter, a state must have enforcement authority commensurate with that given EPA by the Act before a state NPDES program may be approved. Thus, enforcement by the states in the first instance is expected. Likewise, whenever the Administrator finds that any person is in violation of a condition or limitation contained in a NPDES permit, he is first required to notify the violator and the state, thus providing an opportunity for either voluntary compliance or state enforcement in the first instance. ... However, if "beyond the thirtieth day after the Administrator's notification the State has not commenced *appropriate* enforcement action" ..., the Administrator is required to assume enforcement responsibility himself and either issue a compliance order or bring suit in a United States District Court. ...[T]he Administrator may bring a suit himself in federal court even though the state has already filed an enforcement action in state court if the Administrator believes that the state is not prosecuting that action "expeditiously and vigorously."

The court also observed, "the tensions inherent in a federal system are recreated, if not exacerbated by the Act, which ofttimes fails to create clear boundaries for the respective authorities of the federal government, the states, and the people." Id. at 736.

172. For a description of differing state enforcement styles within a single region of the state, see Goldstein & Ford, The Management of Air Quality: Legal Structures and Official Behavior, 21 Buffalo L. Rev. (1972).

173. In recent years, as state responsibility for enforcement of federal environmental standards has increased, federal grant support to run state programs has diminished. In these circumstances, there is concern that some states would become more willing to have their delegations of enforcement authority revoked, and let EPA take over that responsibility. See generally Stanfield, Ruckelshaus Casts EPA as 'Gorilla' in States' Enforcement Closet, National Journal, May 26, 1984, p. 1034.

174. USEPA Office of Water Enforcement, Enforcement Management System Guide (undated; App. 1 indicates issue date of 11-75), available in NPDES Noncompliance and Program Reporting, EPA Docket No. WH-2763-3, item 4 (1984) (hereafter cited as "EMS Guide").

175. EMS Guide.

176. Unpaginated appendix to EMS Guide.

177. Unpaginated appendix to EMS Guide.

178. Thus, the introduction to the Technical Review Criteria, id., noted:

> The Technical Review Criteria serve as a screening device toassure that limited professional resources concentrate on the most significant violations. These criteria are to be used by nonprofessional compliance analysts in the initial screening of Discharge Monitoring Reports and other reports on the quality of NPDES dischargers. Screening based upon the Technical Review Criteria does not establish which deviations from the effluent limitations are violations of the permit or of the Federal Water Pollution Control Act--all such deviations, unless specifically authorized elsewhere in the permit, are violations. Nor do the criteria excuse relatively minor violations. [Emphasis in original.]

179. Thus, one person interviewed in this study who was an EPA staff member at the time significant noncompliance was used

as a performance measure remarked:

> [There was] this silly-ass policy that says you have to be a certain percentage over your permit limit before we consider you in violation. That doesn't mean you're in compliance, it just means you haven't gotten over an administrative hurdle. ... It's long and complicated and it has to do with how many months out of another certain number of months--there's a forty percent figure and a twenty percent figure and a zero percent figure for certain months. By the time you get through it, you don't know what the hell you've got. All I know is that when we put it in, it increased the compliance rates by about thirty, forty percent.

180. *See, e.g., Inspector General Finds Water Policy Officially Sanctions Noncompliance,* Inside EPA, March 16, 1984 at 3:

> The [EPA Inspector General's] report ... reveals that EPA's water enforcement personnel have been abiding by an unofficial policy of reporting only "significant noncompliance," a policy initiated by former water chief Eric Eidsness in February 1982 but which has never been translated into formal regulations. ...[T]he IG report nevertheless asserts that using the unofficial definition of "significant noncompliance" violated the Administrative Procedure Act.

181. 49 Fed. Reg. 29720 (July 23, 1984).

182. *Id.* at 29722.

183. *See* 50 Fed. Reg. 34649 (Aug. 26, 1985).

184. 50 Fed. Reg. 34648 (Aug. 26, 1985).

185. USEPA, Policy Framework for State/EPA Enforcement "Agreements" 11-12 (undated; transmitted with cover memorandum dated June 26, 1984, from ALvin L. Alm, Deputy Administrator, USEPA, to Assistant Administrators, Regional Administrators, etc.)

186. *Id*. at 13.

187. USEPA, National Guidance for Oversight of NPDES Programs FY 1985, at 3 n.1 (undated; transmitted with cover memorandum from Jack E. Ravan, Assistant Administrator for Water,

USEPA, to Regional Administrators, July 6, 1984).

188. Id. at 3, noting that "rapid response to instances of significant noncompliance, especially by major dischargers" shares top priority with updating and renewing expired permits.

189. That is, unless a violator exceeds the significant noncompliance thresholds, neither governmental nor private enforcers would be very likely to bring a court action. However, this is not to say that "nonsignificant" violations by a significant noncomplier would not be included in a complaint, once a decision was made to bring a penalty action. The general practice among both public and private enforcers seems to be to plead all available violations in court papers, and bargain down from there.

190. EPA in its preamble to the final noncompliance reporting regulations, supra note 184, recites that "this regultion in no way codifies enforcement policy. That policy remains under EPA discretion ... ." The Justice Department's Assistant Attorney General for Land and Natural Resources, commenting on a draft Administrative Conference recommendation encouraging EPA to provide more public access to enforcement policy, remarked: "I do not believe that the public, which includes members of the regulated community, should have an active role in setting enforcement policies. Second, members of the public may not necessarily be authorized to rely on many policies, such as policies relating to [calculation] ... of penalties, in private enforcement actions ... ." Letter from F. Henry Habicht II to Loren A. Smith, Chairman, Administrative Conference of the United States, April 26, 1985, pp. 1-2.

191. One representative of a plaintiff group described the selection of enforcement targets as a consensus process:

> [I]t didn't pay to be argumentative. [If someone raised an objection, you just dropped [the case], and took a different one. [W]e never really sat down and came up with criteria for cases.... [T]here had to be a lot of violations, and they had to be continuing to the present. [Those are] by and large the very broad criteria we use.

Some plaintiff organizations have begun to codify selection criteria and to provide guidance for less experienced plaintiffs.

192. Recommendation 85-3, supra note 8.

193. Thus, one lawyer who has represented defendants in citizen suits commented on the draft Administrative Conference recommendations: "Articulation of enforcement policy is generally a laudable goal. The policy itself, however, is one

which, as a practical matter, will be in constant flux in response to public interest and the political process. Therefore, while articulation is useful and desirable, it can never be expected to constitute long-term guidance on the subject." This probably overstates the case, both historically and prospectively. As noted in the text, EPA has attempted to codify enfrocement policy in several areas, with some success. It is doubtful that this process has gone as far as it can or should go. This is not to say that all areas of enforcement policy are amenable to codification, or that policy codifications will ever achieve such stability as to "constitute long-term guidance" in any absolute sense. But stability is a relative term, and it seems desirable to try to achieve some moderation in the sharp swings of enforcement policy that have characterized EPA in recent years.

194. USEPA, Consolidated Evaluation of the Implementation of State/EPA Enforcement Agreements (Dec. 1985).

195. 33 U.S.C. sec. 1318 gives the Administrator of EPA broad authority to require that regulated entities keep records and file reports, and also provides that these records will generally be available to the public. Recordkeeping violations can result in administrative orders, civil penalties, or criminal sanctions under 33 U.S.C. sec. 1319.

196. If the gap in the record is a result of the discharger's failure to file a required report, that may be charged as a separate offense in a citizen suit. _See_ Sierra Club v. Simkins Industries, Inc., LEXIS Slip op. Civ. No. HM84-4018 (D.Md. 1985)

197. There is some indication in the legislative history of the Clean Water Act that Congress intended this discretion to be exercised in support of citizen enforcers. For example, the Senate Report on the 1972 Federal Water Pollution Control Act Amendments notes: "The information and disclosure obligations required throughout the bill are important to the operation of this [citizen suit] provision. The Administrator would have a special duty to make meaningful information on discharging sources available to the public on a timely basis." S.Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3746.

198. For example, in a recent self-evaluation of the agency's Hazardous Waste Data Management System, an EPA study team observed:

> The RCRA enforcement data management system has many problems. These include confusion over data element definition and coding conventions and problems within Regions with data entry. In addition, few states use the system and, therefore, have little stake in

data quality.

USEPA, Consolidated Evaluation of the Implementation of State/EPA Enforcement Agreements 48 (December, 1985).

199. Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L.Rev. 215, 225 n.21 (1983).

200. Id. at 224-5.

201. For a general discussion of the technical and resource limitations on environmental monitoring, see Stanfield, No One knows for Sure if Pollution Control Programs are Really Working, National Journal, March 23, 1985 at 643.

202. The Administrative Conference recommended that EPA and the Office of Management and Budget take into account the potential relevance of private enforcement when deciding upon data collection proposals. [add cite]

203. Under 40 CFR sec. 122.22(d) (1984), a corporate officer submitting a DMR is required to sign the following statement:

> I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system deisgned to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation.

The regulations were recently liberalized to permit a larger number of corporate officers to be the designated signatories of DMRs; see 49 Fed.Reg. 37998, 38035-36 (Sept. 26, 1984).

204. See, e.g., Student PIRG of New Jersey v. Fritzsche, Dodge & Olcott, at 1538; Student PIRG of New Jersey v. Tenneco Polymers, Inc. (D. NJ Civ. Ac. No. 83-2105, Opinion Sept. 10, 1984) at 16-19.

205. See generally Kropp & Flannery, Guilty or Not Guilty--Only Your Statistician Knows for Sure, Env. Forum, April 1984, p. 23.

206. 33 U.S.C. Sec. 1320 (d).

207. United States v. Detrex Chemical Industries, Inc., 393 F. Supp. 735 (N.D. Ohio 1975). This maximum daily penalty limit from the _Detrex_ decision was applied to a private enforcement action in the _Gwaltney of Smithfield_ case, described _infra_ at text accompanying note 224. Since the district court in _Gwaltney_ assessed a $2.3 million penalty, it is clear that the _Detrex_ formulation will not serve to keep penalties low in a major pollution case.

208. The Clean Water Act does not have a special statute of limitations applicable to penalty actions. Dischargers generally argue that the federal courts should apply an analogous state statute to citizen suits, which may have a limitations period as short as two years. Thusfar, the federal courts generally have not followed that approach, but they have split over the issue of what limitations provision to apply. District courts in Maryland and New York have applied the five-year general statute of limitations applicable to government civil penalties, 28 U.S.C. sec. 2462. Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440 (D.Md. 1985); Friends of the Earth v. Facet Enterprises, 15 E.L.R. 20105 (W.D.N.Y. 1984); Sierra Club v. Simkins Industries, LEXIS slip op. Civ. No. HM84-4018 (D.Md. 1985). The New Jersey district court, on the other hand, has ruled that no statute of limitations applies, since application of the federal statute would put private enforcers in an inferior position to their government counterparts as a result of the 60-day waiting period. Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F.Supp. 1394 (D.N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs, LEXIS slip op. Civ. Ac. No. 84-1087 (D.N.J. Aug. 8, 1985); Student Public Interest Research Group of New Jersey, Inc. v. National Starch and Chemical Corp., LEXIS slip. op. Civil 84-1119 (D.N.J. Oct. 15, 1985); Student Public Interest Research Group of New Jersey, Inc. v. Anchor Thread Co., 22 E.R.C. 1150 (D.N.J. 1984); Student Public Interest Research Group of New Jersey, Inc. v. American Cyanannid Co., LEXIS slip op. Civil 83-2068 (D.N.J. Nov. 6, 1985); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F.Supp. 1474 (D.N.J. 1985).

209. Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act (July 8, 1980), BNA Env. Rptr. 41:1101 (hereafter cited as "1980 Penalty Policy"); Environmental Protection Agency Civil Penalty Policy (Feb. 16, 1984), BNA Env. Rptr. 41:2991 (hereafter cited as "1984 Penalty Policy").

210. When settlement negotiations fail and a case goes to court, however, the 1984 Penalty Policy at 2991 indicates that the agency "will request the statutory maximum penalty in the

filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy."

211. For example, one plaintiff's attorney made the following remarks in an interview:

> For some [defendants] they are right, they have been done in by us--in a sense. They say to themselves, "We go to the [agency] people that enforce this law, we talk to them. We have a relationship, they say we're doing good. Then all of a sudden you guys out of nowhere come in here and ask for $500,000 from us. What is this about? We operate in good faith. We've been trying, we spenda lot of money." ... So some of them--I'd say close to half--won't settle if I said to them $5,000. They would say, "I don't care, that's outrageous, you're holding us up and I'm not going to do it." But the other half, I think I can get settlement on half quite easily with low numbers. And that I'm worried about.

212. *See* text accompanying notes 116-120, *supra*.

213. 1984 Penalty Policy at 2996-98.

214. *Id*. at 2999.

215. 1984 Penalty Policy at 2999-3002. The policy generally provides that such adjustments are not to exceed the amount of the gravity component, and further sets percentage limits for particular types of adjustments and levels of justification. *E.g.*, *id*. at 3000, 3001. It seeks to limit settlements for less than the economic benefit to cases where the benefit is an insignificant amount, or is overridden by compelling concerns, or is unlikely to be obtained due to litigation practicalities. *Id*. at 2998. If the gravity component reduces rather than increases the preliminary deterence amount, the violator must clearly demonstrate that it is entitled to the reduction.

216. *Id*. at 3000.

217. *Id*. at 2993.

218. For example, the 1984 Penalty Policy states:

> [E]xperience indicates that it is possible to estimate the benefit of delayed compliance

> through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate.

Id. at 2996. Since the prime interest rate has been well over five percent for many years, the question naturally arises why the five percent figure should be applied in place of market interest rates. The penalty policy does not address this issue. It is possible that the five percent is a net figure taking account of inflation, tax treatment, and so on. The EPA guidance for penalty calculations under the Clean Air Act provides a detailed analysis of these kinds of issues, see 40 CFR Part 66, and the agency's 1984 penalty policy promises more "program-specific" guidance in other areas like the Water Program.

219. It should also be noted that much of the information concerning economic benefit will be more readily available to defendants than to agencies or private plaintiffs. Since defendants can be expected to come forward with this information only in situations when it would lower the amount that the enforcer would otherwise demand, the long-range effect may be to bias the benefit calculus downward.

220. 1984 Penalty Policy at 2999.

221. Id.

222. One law firm handling several private enforcement cases has developed a penalty calculation matrix to generate precise, consistent dollar measures of environmental harm. In this matrix, violations of daily maximum pH or temperature parameters are assessed at ten dollars per day, conventional pollutants like BOD and COD at 50 dollars per day, and toxics or heavy meatals at a hundred dollars. Standard factors are used to increase these amounts if the discharge is two, three, or more times the permit limit, and a parallel calculus is provided when the relevant permit limit is based on average rather than daily maximum discharges.

223. For example, Professor John Scholz has developed sophisticated game theory models of regulatory enforcement which suggest that the best approach is a "tit-for-tat" strategy in which the agency cooperates with firms that demonstrate a willingness to comply voluntarily, but comes down hard on firms that abuse the agency's trust. Scholz, Cooperation, Deterrence,

and the Ecology of Regulatory Enforcement, 18 Law & Society Rev. 179 (1984); Scholz, Voluntary Compliance and Regulatory Enforcement, 6 Law & Policy 385 (1984). At the risk of oversimplifying Prof. Scholz's complex analysis, we note several assumptions which affect the applicability of the game theory analysis to particular areas like Clean Water Act Enforcement: that the system of rules applicable to the area in question will be significantly over- and under-inclusive; that it is possible for the actors to identify these aspects of the rules reliably; that the parties to the compliance transaction are locked into a long-term relationship and have the capacity to make life miserable for one another; and that it is possible to make reliable distinctions between good actors and bad actors. Most of these assumptions are at least somewhat debatable in the EPA context.

224. 22 E.R.C. 2121 (E.D. Va. 1985).

225. See, e.g., Mays, EPA's Superfund Settlement Policy, Environmental Forum, February, 1985, at 6; Macbeth, Settling with the Government, 1 Natural Resources & Environment 9 (1985).

226. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3745, states: "It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant."

227. It is not clear exactly where, or at whose instance, the possibility of creating the funds first arose. Some of the early plaintiff groups, who had obtained foundation funding to conduct investigative work for the initial private enforcement cases, had hoped to "recycle" some cost recovery awards for use in future case investigations, but this does not mean that they necessarily suggested the funds to defendants as a way of financing further cases. Some of the plaintiffs' representatives interviewed in this study recalled that the suggestion had originally come from the defense side in their cases.

228. The tax status of payments made in settlement of citizen suits seems to be debatable. According to interviews, two law firms representing defendants reached opposite conclusions as to whether the payments could be deducted from the firm's tax returns. Apparently nobody has sought a ruling from the IRS on this question.

229. According to data collected by industry sources, during the period from January 1983 to May 1985, twenty-nine controversies produced settlements containing lump-sum payment provisions totalling just under a million dollars. Public-sector entities received slightly less than half of this amount, with the U.S. Treasury receiving about 22% of the total ($218,900) and state or local agencies getting another 20% ($201,950). Of the

$555,600 that went to private recipients, the largest share ($337,900) was given to the Open Space Institute, a foundation with ties to several of the plaintiff organizations. Twenty-one of the 29 settlement agreements had special monitoring requirements, and many also had negotiated penalty provisions for future permit exceedances.

230. E.g., Guida, Dramatic Growth in Citizen Suits Under the Federal Clean Water Act, National Law Journal, Dec. 3, 1984, at 24:

> [E]nvironmental groups are negotiating settlements with dischargers on the basis that the discharger make a "public interest" contribution to an environmental organization other than the one threatening suit. ...
>
> The organizations threatening suit do not accept contributions themselves, apparently to avoid the appearance of blackmail. However, some people see little difference between coercion benefiting a third party and coercion benefiting the organization threatening suit.
>
> In any case, a third-party contribution settlement serves as a useful fundraising effort for environmental causes in general.

231. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. at 3747. This section of the report also states: "Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The committee has added a key element in providing that the courts may award costs of litigation ... to defendants where the litigation was obviously frivolous or harassing."

232. See generally Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983); Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). According to the Sierra Club case, there are approximately 150 federal statutes that permit free-shifting similar to the environmental citizen suit provisions. Although that case involved a different kind of suit, it did make clear that statutes like the CWA which permit fee awards in "appropriate" cases do not authorize the courts to award fees to parties who are wholly unsuccessful.

233. Even if this happens, however, there may still be an incentive gap for one important category of cases: the big, factually complex, and sharply contested case against a major polluter who is willing to fight everything to the last breath. The difficulty is that everybody has a disincentive to bring this kind of case. Agency personnel, who are probably under pressure to make some kind of quota or "bean count" of case referrals,

often tend to stay away from the messy cases that will create a lot of work for them with no corresponding personal benefits. Staff attorneys for environmental organizations typically have overcrowded agendas, and will therefore weigh the opportunity cost of such a case very carefully. They may also be concerned about the organization's won-lost record, and therefore be reluctant to take on risky cases. Private attorneys have an incentive to gravitate to the low-risk, quick-turnover cases that will generate a steady stream of fee income. Some plaintiffs' lawyers have talked about a cooperative system in which participating firms take on a mix of easy and hard cases, but it is not clear whether this goal can be realized.

234. Conference Report No. 92-1236, 1972 U.S.C.C.A.N. 3776, 3823.

235. 405 U.S. 727 (1972).

236. CWA section 505(g), 33 U.S.C. sec. 1365(g).

237. The latter inference is suggested by comparing the relatively precise CWA standing language with the only other citizen suit provision in effect in 1972 when the Water Act citizen suit was enacted, section 304 of the Clean Air Act of 1970. Section 304(a) of the Air Act, 42 U.S.C. sec. 7604(a), simply provided that "any person may commence a civil action on his own behalf," thereby leaving the courts considerable latitude to give some content to the constitutional and prudential requirements of standing.

238. Investing scarce lawyer time and out-of-pocket expense money in establishing the organization's standing can be especially frustrating when plaintiff's law firm is depending upon an eventual award of attorneys' fees to cover these expenses. One lawyer handling several citizen suits remarked:

> [W]e got a judge this morning who said they can depose all of the nine people we submitted affidavits for. I think that's a horrible waste oftime andresources .... . Theoretically you're entitled to it in the sense that you have a right to say the guy who submitted the affidavit doesn't really swim in that river. ... But ... think about it for a moment. Is it very likely that we have nine affidavits from people who say that they canoe on the river, when they don't canoe on the river? I mean, what are the chances of a lawyer breaking down a witness on a fact like that? Lawyers have got it in their minds that you don't accept affidavits, ... you take depositions. There's a style

of litigation that says that's what you're supposed to do.

239. E.g., Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F.Supp. 1394, 1397 (D.N.J. 1985).

240. Sierra Club v. Aluminum Company of America, 585 F.Supp. 842, 852 (N.D.N.Y. 1984).

241. See, e.g., Student Public Interest Research Group of New Jersey, Inc. v. Anchor Thread Co., 22 E.R.C. 1150 (D.N.J. 1984); Sierra Club v. Simkins Industries, Inc., LEXIS Slip op. Civ. No. HM84-4018 (D.Md. 1985); Friends of the Earth v. Facet Enterprises, Inc., 15 E.L.R. 20106 (W.D.N.Y. 1984); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F. Supp. 1479 (D.N.J. 1985); Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp., 23 E.R.C. 1338 (D.N.J. 1985); Nunam Kitlutsisti v. Arco Alaska, Inc., 592 F.Supp. 832 (D.Alas. 1984); Sierra Club v. C.G. Manufacturing, Inc., LEXIS Slip op. Civ. Ac. No. 84-1784-Z (D.Mass. Apr. 12, 1985); Friends of the Earth v. Consolidated Rail Corp., No. 85-7033 (2d Cir. 1985).

242. In several cases, the Sierra Club tried to establish what might be called a "zip code theory" of standing. Thus, in Sierra Club v. Coca-Cola, Co., No. 84-827-Civ-T-15 (M.D. Fla., Order of October 10, 1984) a private enforcement action against a citrus processing plant in Florida, the Club alleged that it "has 9,627 members in the State of Florida and one member in United States Postal Service Zip Code 33823 in which the violations complained of herein have occurred." This type of standing claim has been uniformly rejected, not only in the Coca-Cola case but also in others where the Sierra Club has tried variations on the zip code theory. For example, in Sierra Club v. SCM Corp., 580 F.Supp. 862 (W.D.N.Y. 1984), plaintiff claimed that 2,200 of its members resided within a 70-mile radius of the plant, that one member lived in the town where the plant was located, and that it was burdensome for this one member to be subjected to interrogatories and depositions. Id. at 864 n.3. The court rejected these generalized allegations; affirmed 747 F.2d 99 (2d Cir. 1984). Plaintiffs' standing may not be defeated if government enforcers "overfile" the citizen group's lawsuit, or seek to enter it. United States v. Metropolitan District Com'n, LEXIS Slip op. Civil Ac. No. 85-0489-MA (D.Mass. Sept. 5, 1985). In one unusual case, a corporation claiming esthetic damage rather than economic injury was denied standing in the lawyers' fees stage of a private enforcement action. Citizen's Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Auth., 765 F.2d 1169 (D.C. Cir. 1985).

243. In a few instances, plaintiff organizations have

sought protective orders or otherwise attempted to prevent public disclosure of the identities of allegedly injured members. *See* Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440 (D.Md. 1985) (protective order granted); Sierra Club v. SCM Corp., 747 F.2d 99(2d Cir. 1984) (First Amendment associational privacy claim regarding members identities waived); Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 22 E.R.C. 2121 (E.D. Va. 1985) (injured members need not be identified).

244. *E.g.*, Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F.Supp. 1394 (D.N.J. 1985).

245. Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co., Civil 83-2068 (D.N.J. Nov. 6, 1985).

246. Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories, Civ. Ac. No. 84-1087 (D.N.J. Aug. 8, 1985).

247. Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 782 (1971).

248. *Id.* at 783.

249. Brief of Defendant Monsanto Company for Summary Judgment Based on Unconstitutionality of Section 505 FWPCA Civil Penalty Citizen Suit Provision at 5, 8, 25. The brief argued both a violation of separation of powers and an unconstitutional delegation, but the basic issues addressed in the two theories were very similar.

250. *E.g.*, K. Hawkins, Environment and Enforcement: Regulation and the Social Definition of Pollution 4 (paper ed. 1984) (emphasis in original):

> A penal style is accusatory and adversarial. Here enforcement is reflective: a matter of determining what harm was done, of detecting the lawbreaker and fixing the appropriate sanction. ... If [a violation and a violator can be detected], then the breach *deserves punishment*. In a compliance strategy, on the other hand, the style is conciliatory and relies upon bargaining to attain conformity. ... If prevention of future misconduct occurs, it does so as a result of negotiation rather than ... deterrence ... A standard which has not been attained in a complaince system *needs remedy*.

251. Guida, Dramatic Growth in Citizen Suits Under the Federal Clean Water Act, National Law Journal, Dec. 3, 1984, at 24, 25.

252. *E.g.*, Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott, 579 F. Supp. 1528, 1535 (D. N.J. 1984): "[P]ublic participation in enforcement actions promotes the goals of the Act, as well as administrative efficiency. Reponsible citizen groups, concerned with the quality of our environment, and willing to contribute to its betterment, perform a public service in their efforts to enforce the Clean Water Act."

253. As previously mentioned, the various plaintiff organizations in the current wave of citizen suits are not all in agreement on matters of policy and strategy. For example, one of the organizations contacted in this study tends to stay relatively close to the dispute resolution model, to the extent that it will not bring a case unless there are complaints from members who reside near the discharge and demonstratable interference with usage of the resource, in addition to the paper record of permit violations. As suggested in the text, many of the organizations begin with a paper record of violations, culled from the files of EPA or the responsible state agency, and then contact local members, or a friendly local group, to see whether they are interested in becoming parties to an action.

254. In the delegation dispute in the Monsanto case, the plaintiffs argued that not only their enforcement actions were in fact consistent with EPA's expressed enforcement policy but also that "Congress did not want EPA's prosecutorial discretion to be conclusive. It deliberately established a dual enforcement scheme which would place a check on EPA's discretion." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment Based on Unconstitutionality of Section 505 of the Federal Water Pollution Control Act at 23. In one case, NRDC and Hudson River Sloop Clearwater argued more explicitly that they were standing in the shoes of the government. The company they were pursuing in a penalty action filed for bankruptcy, and the environmental organizations responded that they came within a statute exempting suits by governmental units from the bankruptcy law's stay of legal actions against the debtor. The court disagreed, holding that "both the statute and the legislative history demonstrate that the term 'governmental unit' in the bankruptcy code refers exclusively to actual government groups and not to organizations acting in a governmental capacity." In re Revere Copper and Brass, Inc., 32 B.R. 725, 727 (S.D.N.Y. 1983).

255. The gap between these two philosophies of regulatory enforcement echoes a recent observation by Professor John Coffee

in a related context:

> [I]t may be well a recurring characteristic of our legal culture that formal changes accepted on a doctrinal level are still frequently resisted and partially nullified on the less visible level where operation decisions are routinely made. ...[O]ur society's actual acceptance of the private attorney general may be more tentative and incomplete than it first appears.

256. 104 S.Ct. 3315 (1984).

257. Id. at 3325.

258. Id.

259. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). One situation in which the court may not have "a realistic appreciation of the consequences" of its decision in a citizen suit is when the government declines to become a party, and has not articulated a policy on a matter of decisional significance. See text accompanying notes 169-70, supra. While this is a significant potential problem, it has not yet emerged as a serious practical problem. It is possible that EPA's efforts to codify enforcement policy, together with selective intervention in cases of precedential significance, will provide adequate protection against uninformed judicial decisions during the transitional period when many unresolved issues relating to the citizen suit provisions are being litigated. To some degree, the Valley Forge formulation quoted in the text can be criticized on the ground that a focus on particular facts relating to the parties will not be "conducive to a realistic appreciation of the consequences of judicial action," because the parties to the litigation may be atypical of the larger universe of actors potentially affected by the court's decision. See D. Horowitz, The Courts and Social Policy (1977). Thus, in decisions affecting implementation of a regulatory statute, what may be most needed are general "legislative" facts relating to the anticipated programmatic consequences of alternative decisions.

260. The Valley Forge case, supra note 259, notes two other functional justifications for a constitutional injury-in-fact requirement. First, the requirement "reflects a due regard for the automomy of those persons likely to be most directly affected by a judicial order," because it limits the power to invoke the judicial process to those who have suffered actual injury. Id. at 473. However, the Court makes clear that noneconomic injuries like those asserted by plaintiffs in citizen suits adequately serve this purpose: Sierra Club v. Morton is cited with

approval, id., and the majority later states explicitly, "we do not retreat from our earlier holdings that standing may be predicated or noneconomic injury," id. at 486; see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). Second, the Court notes that "[t]he exercise of the judicial power also affects relationships between the coequal arms of the National Government," id. at 473; but it also states that this "effect is act of the Legislative or Executive branch," id. Arguably private enforcement would be less disruptive of interbranch relationships than either a declaration of unconstitutionality or invalidation of a major policy decision of the other branches; however, as noted in the text, there are other ways to analyze the relationships among the branches.

261. See, e.g., Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. Chic. L. Rev. 653, 669-70 (1985):

> The suggestion [that judicial review of agency inaction would usurp executive functions] is based on the understanding that enforcement activity is entrusted to the executive, not to the courts, and that judicial involvement--in the form of a decrees compelling prosecution--would violate the separation of powers. While this basic understanding is correct, the conclusion does not follow. The "take care" clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws.

262. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk L.Rev. 881 (1983).

263. Id. at 886.

264. The general rule at common law is that a plaintiff cannot bring an action against a "public nuisance" that affects the community generally unless he can show special damages distinguishing his harm from the harm to the public at large. See, e.g., Weinstein v. Lake Pearl Park, Inc., 196 N.E. 2d 638 (Mass. 1964). However, special damages adequate to support a private action need not be harm to a traditional property interest; it could, for example, be loss of income to a commercial fisherman when water pollution interfered with his right (held in common with the general public) to catch fish in state waters. See, e.g., Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E. 2d 538 (1943); Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195 (Sup. Ct. Ore. 1939). In addition, some states have abolished the distinction by legislation, and have permitted individuals to sue

for abatement of a public nuisance. _See, e.g._, Florida ex rel. Gardner v. Sailboat Key, Inc., 295 So. 2d 658 (Ct. App. Fla. 1974). _See also_ text accompanying note 282, _infra_.

265. The basic collective goods problem is described as follows in Mancur Olsen's, The Logic of Collective Action 48 (paper ed. 1977):

> [T]here are ... three separate but cumulative factors that keep larger groups from furthering their own interests. First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action, and the farther the group falls short of getting an optimal supply of the collective good... Second, ... the larger the group the smaller the likelihood of oligopolistic interaction [among subsets of group members] that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained.

266. _Supra_ note 262, at 897 (emphasis in original):

> Does what I have said mean that, so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of _course_ it does--and a good thing, too. When no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost ormisdirected .... The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative.

267. Allen, _The Police and Substantive Rulemaking: Reconciling Principle and Expediency_, 125 U. Pa. L. Rev. 62, 83 (1976), quoting J. Sutherland, IA Statutes and Statutory Construction (1972).

268. Sunstein, _supra_ note 261, at 270.

269. During this period control over the initiation and specification of legislation was shifting from the Crown to the Parliament. Thus it is probably impossible to determine just where the proposal for this statute came from, although we can be confident that Parliament at the very least approved it. See Holdsworth, 2 History of English Law 435-440 (3d ed. 1923).

270. The Statute of 12 Rich. II, c. 13 (1388), reads as follows in relevant part:

> For that so much Dung and Filth of the Garbage and Intrails as well as of Beasts killed, as of other Corruptions, be cast and put in Ditches, Rivers, and other Waters, ... that the Air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen, ... to the great Annoyance, Damage and Peril of the Inhabitants, Dwellers, Repairers, and Travellers ...; (2) ... all they which do cast and lay all such Annoyances ... in ... Waters ... shall cause them utterly to be removed, avoided, and carried away [before the next Feast of St. Michael] ... every one upon Pain to lose and to forfeit to our Lord the King [twenty livre] ... (3) ... the Mayors and Bailiffs ... shall compel the same to be done upon like Pain. (4) And if any feel himself grieved, that it be not done in the Manner aforesaid, and will thereupon complain him to the Chancellor after the said Feast of St. Michael, he shall have a Writ to make him of whom he will complain come into the Chancery, there to shew why the said penalty should not be levied of him, and if he cannot excuse himself, the said penalty shall be levied of him. (5) ... none of what Condition soever he be, [shall] cause to be cast or thrown from henceforth any such Annoyance ... into the ... Waters ...; (6) and if any do, he shall be called by Writ before the Chancellor, at his Suit that will complain; and if he be found guilty, he shall be punished after the discretion of the Chancellor.

This translation is from the 1763 edition of the Statutes At Large edited by Owen Ruffhead. For the most part it is simply a reprinting of the translation current at the time. Since the statute is not be analyzed in detail here, it is unnecessary to go into the potentially complicated problems of verifying the meanings of particular provisions and a detailing the duties or prerogatives created by them.

271. This statute did not explicitly establish financial incentives for private enforcers, but other statutes enacted at the same time did. A 1331 statute, for example, allocated one-fourth of any fines imposed on stallholders selling goods after the close of a fair to "every Man that will sue for our Lord the King". 5 Edw. 3, c. 5 (1331).

272. Milsom, Historical Foundations of the Common Law 417 (2d ed. 1981): "To lawyers in the fourteenth century a statute was not something external to the law: it was an internal alteration, and it lived in its context so that its application was neither mechanical nor unalterable."

273. _E.g._, McRae, _The Development of Nuisance in the Early Common Law_, 1 U. Fla. L. Rev. 27, 35 (1948).

274. Private plaintiffs could bring actions only for private nuisances, which were defined as infringing their rights in the use and enjoyment of land. Prosser, for example, offers the following:

> A private nuisance is a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes, the normal remedy is in the hands of the state.

W. Posser, Law of Torts 572-573 (4th ed. 1971).

275. Glanvill, writing in the twelfth century, noted that legal pleadings were of two kinds, civil and criminal. But as Milsom observes, "his distinction is not ours. Civil pleas are those concerning land and the old personal actions; and all wrongs are criminal, presumably because there is offense to the community as well as to the victim..." Milsom, _supra_ note 272, at 285. By the "old personal actions" Milsom refers to claims of the middle ages known as debt, detinue, covenant, and account. _Id_. at 244. Another way of understanding the distinction between civil and criminal pleas is in terms of the "demand for a right" as opposed to the "complaint of a wrong". _Id_. at 243.

276. Indeed, even attempting to distinguish between "private individuals" and "pubic authorities" during the era is

artificial. Both "privateness" and "publicness" were embedded in the roles of individuals based on their positions -- property rights -- in the feudal tenure system. Merryman puts the point nicely:

> In a truly feudal system the distinction between public and private law fails to make sense. Property and office are indistinguishable; tenure of land determines both "public" and "private" rights and duties. Depending on one's premises he could today characterize all feudal law either as private law or as public law, but there was no occasion for such speculation at the time.

Merryman, The Public Law-Private Law Distinction in European and American Law, 17 J. Pub. L. 2 (1968).

277. Holdsworth, supra note 269, at 453.

278. We are not suggesting that the distinction between public and private actions ever became as strong or as consciously fundamental in English and American law as in European law. Nonetheless, it became a critical force in the nineteenth century, as courts tried to sort actions into private (contracts, torts, property, commercial law) and public (constitutional, criminal, and administrative law). To a certain extent, no doubt, the effort was pragmatic; courts wanted to limit the number of actions available in response to any given infraction. Such a separation became increasingly necessary with the emergence of strong, centralized states. But to a significant extent the effort was also political and ideological. The explicit goal of many nineteenth century judges was to create spheres of private activity, in which market forces would be able to operate free from state interference. For a short argument quite similar to ours. See Horwitz, The History of the Public/Private Distinction, 130 U. Penn. L. Rev. 1423 (1982).

279. For useful summaries of the history of writs for remedying the nuisance-like problems we have referred to, see McRae, supra note 273, and Winfield, Nuisance as Tort, 4 Cambridge L. J. 189 (1931).

280. The hundreds were institutionalized meetings of important landholders in subdivisions of counties. They were generally served by bailiffs, and the right to hold hundreds meetings was often held in a proprietary fashion we would think of as a form of private property. Milsom, supra note , at 15-16.

281. Id.

282. It appears that this distinction, quoted from Prosser in note 274, supra was only laboriously built up over the passage of centuries. We have already noted that there was no meaningful distinction between crime and tort in the early centuries after the Conquest. To the degree that "private" plaintiffs were excluded from certain kinds of nuisance actions, the basis seems to have been that the crown or the lord "owned" them, rather than that it was inappropriate for a private plaintiff to bring such an action as a matter of policy. Glanvill, for example, maintained that "[w]henever a nuisance is committed affecting the King's highway, or a city, the suit concerning it belongs to the King's Crown." Cited in McRae, supra note 273, at 36. Conversely, a landholder had an action when the nuisance interfered with his rights to use and enjoyment of land.

The unifying principle, if there was one, was that rights of action should be allocated according to whose rights and prerogatives were interfered with in the feudal tenure system. This formalist impulse, of course, was frequently confronted with the reality that a given wrong interfered with more that one type of feudal right. In the early years as we have indicated, actions might be brought by a variety of actors. As the law attempted to systematize actions, however, it also attempted to limit the available set of actions. The courts eventually retreated from the enterprise, in significant degree, by propounding a proto-realist analysis that a public nuisance might also give rise to an action in an individual who had suffered "special damages". The earliest suggestion of this proposition appears to have occurred in 1411 (Y.B. 12 Hy. IV. p. 43). But it was clearly stated in a much discussed dictum by Judge Fitzherbert in 1536 ("If one makes a ditch across the highway, and I come riding in my way by night, and I and my horse are thrown into the ditch, so that I suffer great damage ... in this case I shall have an action against him who made the ditch across the way, because I am more damaged by this than any other", quoted in VIII Holdsworth 424, supra note 269). The courts had tremendous difficulty coming to any even remotely coherent definition of special damages. (See the rather tortured discussion in Prosser, supra note 274, at 586-591.) The important point is that the courts have long permitted private rights of action even in cases which they have declared to be public nuisances (i.e., crimes) and where no such right is statutorily granted. On the other hand, it has been extremely difficult to predict when such private rights would be permitted, and they were probably more often than not denied. Overall, then, while the courts, in response to rapid urbanization and industrialization, declared an ever growing list of activities to be public nuisances, they curbed the import of those declarations by generally -- but not always -- limiting actions to public officials.

283. 2 L. Radzinowicz, 2 A History of English Criminal Law

and its Administration from 1750, 1-29 (1956).

284. Hay, Supra note 9.

285. 2 L. Radzinowicz, supra note 283.

286. Id.

287. Id. at 112.

288. Interestingly, liberals and reformers of the eighteenth century also sought to use incentives to encourage collective responsibilty for enforcement. The collectivity, generally through the hundred, might be held responsible to pay damages to the executors of any person killed while trying to arrest an offender, and sometimes to those whose property had been damaged by rioters. Id. at 163-65. In 1766, Edmund Burke even proposed that the hundreds be required to indemnify parties injured by thefts from shipwrecks within their jurisdiction. Moreover, there was serious discussion about compelling parishes to pay rewards to those who solved and prosecuted crimes committed in their areas, as well as to individuals who prevented crimes. Id. at 166. By the middle of the nineteenth century however, with Sir Robert Peel's reforms and the rise of a professional police force, the idea of creating incentives to force collective responsibilty had largely fallen into disuse.

Another form of reward which should be noted is that individuals who had succeeded in apprehending and convicting certain types of offenders were often exempted from various onerous community offices. Id. at 158-63.

Finally, there was a incentive-based analogue to our modern action forcing provisions. Constables were to be encouraged toward more vigorous enforcement by various fines, many statutorily set, for failure to perform their duties. Id. at 162.

289. Id. at 139-146; see also Kurland & Waters, Public Prosecutions in England, 1854-79: An Essay in English Legal History, 1959 Duke L.J. 495.

290. For example, Radzinowicz notes, id. at 147: "In 1736 a statute was passed which aimed at securing what almost amounted to the prohibition of all alcoholic liquors, at a time when drinking was particularly rife. This was an opportunity of which the informers could not fail to take advantage. They rushed to assist in the enforcement of this drastic law, and their infamous achievements became notorious. ... In 1738 the legislature felt it necessary to extend to common informers penal protection against the rage of the populace."

291. Id. at .

292. Id. at 139.

293. Marvin v. Trout, 199 U.S. 212, 225 (1905).

294. United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 (1943).

295. Note, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction, 65 Yale L.J. 209, 218-19 (1955). For a more recent but less useful analysis of this topic, see Recent Case Note, Private Prosecution--The Entrenched Anomaly, 50 N. Carolina L. Rev. 1171 (1972), discussing State v. Best, 280 N.C. 413, 186 S.E. 2d 1 (1972).

296. Thalheim v. Florida, 38 Fla. 169, 183-84 (1896).

297. Thus, in the Thalheim case, supra note 296 at 183, the court reasoned:

> A public prosecution must be conducted by the proper official representative of the State, and must not under any circumstances be under the entire management and control of private parties and their attorneys. It is proper, however, for the State Attorney, when there is no express statutory prohibition, to obtain, with the consent of the court, the assistance of other counsel, and other members of the bar are not incompetent to be engaged for such assistance and taking part in the trial by reason of being retained and compensated by the prosecuting witness, the party injured by the crime, or other private interests. When such assistants are employed in the case, the State Attorney should always remain present at the trial ....

Accord, Oglesby v. State, 83 Fla. 132 (1922). Some states interpreted statutes granting powers to public prosecutors as denying a role to private parties in criminal matters. For example, in Meister v. People, 31 Mich 99, 104 (1875), the court construed such a statute to mean "that the legislature do not consider it proper to allow the course of the prosecuting officer during the trial to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a [d]uty of impartiality not altogether unlike that of the judge himself." Other courts thought that this characterization understated the adversary role of the prosecuting attorney. Thus, in Thalheim, supra, at 186, the court rebutted the impartiality argument in the following terms:

> The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and jury, there would be an end to the conviction of criminals. Zeal in the prosecution of criminal cases is therefore to be commended, and not condemned. ... And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistant was employed by the public, or by private persons?

298. Note, *supra* note 295, at 210.

299. Illini Books edition (1971) at 189.

300. Commentators from a variety of perspectives have made broadly similar arguments on this point. *See, e.g.*, S. Breyer, Regulation and Its Reform 109-114 (1982) (concluding, *inter alia*, agency information needs in the standard-setting and enforcement processes frequently make the agencies dependant on the industry).

301. *See generally* R. Axelrod, THE EVOLUTION OF COOPERATION (1984) for an exposition of this position. For its application to enforcement problems, *see* Scholz, *supra* note ____.

302. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Law*, 1985 Wisc. L. Rev. 655.

303. The Federal Trade Commission in the late 1970s provides an example of an agency out of touch with political realities. *See, e.g.*, Boyer, *"Too Many Lawyers--Not Enough Practical People": A Case Study on Legal Controls and Administrative Discretion*, 5 Law & Policy Quarterly 9 (1983).

304. Mashaw, *Prodelegation*, 1 J. of Law, Econ., and Org. 81 (1985).

BACKGROUND REPORT FOR RECOMMENDATION 85-4

FORUM CHOICES FOR THE REVIEW OF AGENCY ADJUDICATION: A STUDY OF THE IMMIGRATION PROCESS

(to be published in Iowa L. Rev., Vol. 71, No. 5, July 1986)

by Stephen H. Legomsky

CONTENTS

Introduction

I. IMMIGRATION ADJUDICATION: AN OVERVIEW
    A. Substantive Principles
    B. The Initial Decisionmaking Process
    C. Administrative Review
    D. Judicial Review

II. CHOOSING A REVIEW FORUM: GENERAL CRITERIA
    A. Goals in Selecting a Forum
    B. Forum Attributes
    C. Case Attributes
        1. Impact on the litigants
        2. Types of issues cases tend to raise
        3. Volume
        4. Rate of appeals
        5. Need for taking of evidence
        6. Similarity of issues to those in other cases
        7. Avoidance of bifurcation
        8. Incentive to delay
        9. Relationship between administrative forum and judicial forum
        10. Status quo
        11. Constitutional limitations

III. CHOOSING A REVIEW FORUM: IMMIGRATION CASES
    A. Deportation
    B. Exclusion
    C. Other Orders
        1. Visa petitions
        2. Waivers
        3. Other decisions affecting immigration status
        4. After exclusion or deportation
    D. Adjustments to B.I.A. structure and procedure
        1. Panel system
        2. Expansion of the membership
    E. The Attorney General and the B.I.A.
        1. Should the Board be a statutory body?
        2. Should a statutory B.I.A. remain within the Justice Department?
        3. Who should name the members of the Board, and who, if anyone, should have the power to remove them?
        4. Who should define the jurisdiction of the B.I.A.?

- 5. Should the Attorney General retain the power to review decisions of the B.I.A.?
- F. Adjustments to Jurisdiction of Courts

IV. A Specialized Immigration Court
- A. Specialist or generalist?
  - 1. Quality
  - 2. Efficiency
  - 3. Side-effects of specialized jurisdiction
- B. Centralized or dispersed?
- C. Article I or Article III?

CONCLUSIONS

- A. General
- B. Administrative Review
- C. Judicial Review
- D. Specialized Court

APPENDIX

FORUM CHOICES FOR THE REVIEW OF AGENCY ADJUDICATION: A STUDY OF THE IMMIGRATION PROCESS

by Stephen H. Legomsky*

Today, important agency adjudication is generally subject to some form of review at the instance of the aggrieved party. The modern literature is replete with thoughtful commentary on the review process. The writings have traditionally focused on the questions of which actions should be reviewable and how searching the review should be.

Surprisingly, however, one question has been largely neglected:[1] To whom should the review function be entrusted? The options are many. At the administrative level, review might be by a single individual or by a collegial body; by policymakers or by personnel who enjoy varying degrees of independence from the political machinery; by lawyers or by non-lawyers. At the judicial level, review might be in the courts of general jurisdiction or in specialized courts. If the former is preferred, review might be assigned to the district courts or to the courts of appeals. If specialized review is preferred, review might be by a centralized forum or by a network of tribunals geographically dispersed, and it might be by an article I court or by an article III court.

Those choices have to be made every time Congress creates a new program that requires administrative decisionmaking in individual cases. Ideally, the options should also be weighed periodically for the purpose of evaluating those adjudicatory processes that are already in place. Both tasks require a general framework for selecting the forums in which particular classes of administrative decisions can best be reviewed. Constructing such a framework is the principal aim of this article.

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*Associate Professor of Law, Washington University. This article is based on a report that I prepared as a consultant to the Administrative Conference of the United States. I thank the many people who shared their time and thoughts during the course of the study. Candy Fowler, Janet Gilboy, Warren Leiden, Ron Levin, Jeff Lubbers, Frank Miller, Maurice Roberts, Paul Schmidt, Peter Schuck, Lynda Zengerle, and the members of the Judicial Review Committee of the Administrative Conference reviewed previous drafts and provided comments that were especially helpful. Others whose efforts were valuable and much appreciated include Lee Beck, Robert Bombaugh, Charles Gordon, Michael Hoefer, David Holmes, Gerald Hurwitz, James McCafferty, Hon. William Robie, and Lawrence Weinig. The views expressed here are, nonetheless, solely my own.

[1] Two impressive exceptions to this pattern are Cass, Agency Review of Administrative Law Judges' Decisions, 1983 Admin. Conf. of the U.S. Recs. & Rpts. 115 (leading to A.C.U.S. Rec. No. 83-3, 1 C.F.R. § 305.83-3), and Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Col. L. Rev. 1 (1975)(based on report leading to A.C.U.S. Rec. No. 75-3, 1 C.F.R. § 305.75-3).

Studies of agency adjudication have been marked by another tradition as well: the demarcation of administrative review and judicial review into discrete subject areas. Distinctions between the two systems are certainly supportable. To many, courts symbolize independence and impartiality, at least to a greater degree than do tribunals located within the executive branch. Moreover, contrasts between specialist administrative bodies and generalist courts give rise to corresponding differences in the functions of review. All these differences are real and widely accepted. It is not my intent to disavow them.

At the same time, I believe that the line separating administrative review from judicial review is not nearly as crisp as is customarily assumed. As will be seen, courts and many of the administrative appellate bodies share a number of common attributes. Indeed, in several respects, some administrative appellate bodies have much more in common with courts than they do with other administrative agencies.

For that and other reasons outlined below, administrative review and judicial review should be seen as parts of a single, continuous, adjudication process. Studying them in tandem yields tangible benefits. First, to select a review forum for a given class of cases, it is necessary to match the attributes of those cases with the attributes of the possible reviewing bodies in a way that will optimize the fit. Most of the differences between district courts and courts of appeals will be shown to parallel roughly the differences between the tribunals often available for administrative review. Consequently, once the pertinent characteristics of a class of cases have been isolated, the results can be used to select both a forum for administrative review and a forum for judicial review.

Second, decisions as to administrative review will themselves affect decisions as to judicial review, and vice-versa. A decision to provide no administrative review at all might force an aggrieved party to pursue remedies in court. Further, for several reasons explored below, a decision to place administrative review in a particular forum might influence the choice of forum for judicial review, and vice-versa. Finally, even after an administrative reviewer has been selected, the question whether to authorize further review by the agency head is inseparable from the question whether to allow the agency to initiate judicial review.

Third, courts and certain appellate administrative bodies perform a number of common functions. Proposals to substitute a single specialized court for the combination of specialist administrative review and generalist judicial review require assessments of the extent, if any, to which the commonality of functions results in duplication of effort.

The immigration process affords a superb illustration of how the general framework offered in this article can be applied. The governing statute[2] and accompanying regulations[3] authorize a bewildering array of administrative decisions in individual cases. Initial decisionmaking is by various officials in various agencies after various procedures. Most of the major immigration decisions are subject to administrative review, but to different bodies. Most are also subject to judicial review, some in the district courts and some in the courts of appeals.

Timing also favors immigration as a target area for a study of forum selection. Recent congressional bills have taken aim at both administrative and judicial review structures in the field of immigration.[4] Within the Department of Justice, there is talk of curtailing administrative review of certain controversial categories of decisions.[5] The immigration bar has voiced its deep-seated dissatisfaction with at least one crucial component of the administrative appellate apparatus.[6] And the subject of judicial review has become a perennial battlefield in this corner of the law.[7] Pressures are building, and something is certain to give soon.

Section I of this article will briefly summarize the present adjudication structure in immigration law.[8] It will proceed from the initial decisions,[9] to the administrative appeals,[10] to judicial review. The second section is the heart of the study. It will develop general criteria for selecting both the proper administrative forum and the proper judicial forum in which to review agency adjudication. Section III will then apply those general criteria to several illustrative classes of immigration cases. In that section, I conclude that the existing structure of administrative appeals requires radical surgery. Reasons for the current allocation of cases among the major administrative reviewing bodies are difficult, if not impossible, to discover. In contrast, the current scheme of judicial review is generally both understandable historically and defensible today, but even there some adjustments would be beneficial. The final section

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[2] Immigration & Nationality Act, Act of June 27, 1952, Pub. L. 82-414, 66 Stat. 163 [hereafter cited as I. & N. Act].

[3] See 8 C.F.R. (Dept. of Justice); 20 C.F.R. §§ 655, 656 (Dept. of Labor); 22 C.F.R. §§ 41, 42, 46 (Dept. of State).

[4] See notes 272, 273, 432, 442, 459, 461, 491, 513, 514, and 546 infra and accompanying text.

[5] See note 86 infra and accompanying text.

[6] Interview with Warren Leiden, Executive Director, American Immigration Lawyers Assn., June 14, 1985 (immigration lawyers have been criticizing quality of Administrative Appeals Unit's decisions). See generally notes 83-85, 150-62 infra.

[7] See generally § III.A infra; see especially the congressional bills, testimony, and commentary contained in the passages that are cited in note 4 supra.

[8] For more detailed descriptions of substantive immigration law, the reader is referred to general sources in that area. The most comprehensive treatise is C. Gordon & H. Rosenfield, Immigration Law and Procedure (rev. ed. 1984). For other general works, see T. Aleinikoff & D. Martin, Immigration Process and Policy (1985); A. Fragomen, A. Del Rey, & S.

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8. (continued) Bernsen, Immigration Law and Business (1983); A. Fragomen, A. Del Rey, & S. Bell, Immigration Procedures Handbook (1985); T. Goger (ed.), Immigration Law Service (1985); E. Harper, Immigration Laws of the United States (1975); B. Hing, Handling Immigration Cases (1985); A. Leibowitz, Immigration Law and Refugee Policy (1983); National Lawyers Guild, Immigration Law and Defense (2d ed. 1981); R. Steel, Steel on Immigration Law (1985); J. Wasserman, Immigration Law and Practice (3d ed. 1979); D. Weissbrodt, Immigration Law and Procedure in a Nutshell (1984).

[9] Paul Verkuil has recently completed a preliminary study of immigration procedure. See Verkuil, A Study of Immigration Procedures, 31 U.C.L.A. L. Rev. 1141 (1984)(based on previous study for the Administrative Conference). Applying flexible due process and Mathews v. Eldridge, 424 U.S. 319 (1976), Verkuil suggested a framework for determining which procedural ingredients are constitutionally required when various types of adjudicative immigration decisions are made. Emphasis was on the initial hearings, although administrative and judicial review were also noted briefly. 31 U.C.L.A. L. Rev. at 1179-84. The present study will accept the initial decisionmaking process as a given.

Another recent study of immigration procedure was conducted by the President's Management Improvement Council. See Final Report, Management Improvements in the Immigration and Naturalization Service (Sept. 1981). The Report focused entirely on the initial adjudication process and, as to that, addressed only matters of administrative efficiency. Id. at 1,2.

[10] See also Frank Goodman's excellent unpublished study of caseload management problems at the Board of Immigration Appeals, A.C.U.S. Report Concerning Improvements in Administrative Organization and Procedures of United States Board of Immigration Appeals (Oct. 17, 1973) (not addressing question of proper forum).

will comment on recent proposals for a specialized immigration court.[11]

I

Immigration Adjudication: An Overview

Substantive Principles

The federal statute governing immigration to the United States is the Immigration and Nationality Act of 1952,[12] as amended. The Act distinguishes two basic processes: the exclusion of aliens who seek admission to the country and the deportation of aliens already here.[13]

Within the realm of admission, the statute further distinguishes between immigrants and non-immigrants. The latter are defined as aliens who establish that they fit within any of several, statutorily enumerated, categories of temporary visitor.[14] Common examples are tourists, business visitors, students, and temporary workers.[15] Immigrants, defined residually, encompass everyone else.[16] Aliens admitted as immigrants may remain in the United States permanently, provided only that they do not engage in behavior rendering them deportable.[17]

As might be expected, aliens seeking to enter as immigrants face more stringent obstacles than do aliens seeking to enter as non-immigrants. Non-immigrants are numerically unrestricted.[18] In contrast, with certain important exceptions,[19] immigrants are subject to statutory quotas; in a given year, no more than 20,000 immigrants may be admitted from any one country and no more than 270,000 may be admitted worldwide.[20] The latter figure is subdivided among six "preference categories," each of which is allocated a specified percentage of the worldwide quota.[21] Four of those categories comprise aliens who possess specified family ties to American citizens or, in some cases, to other lawfully admitted permanent resident aliens.[22] The other two categories comprise aliens who meet certain occupational criteria.[23] Within each preference category, places are normally distributed on a first-come, first-served, basis.[24]

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[11] The Administrative Conference is presently conducting a more general study of specialized courts in administrative law.

[12] See note 2 supra

[13] For purposes of that distinction, physical presence in the United States is not always dispositive. For treatment of the numerous technical problems arising in that context, see, e.g, Aleinikoff & Martin, note 8 supra, ch. 4.

[14] I. & N. Act § 101(a)(15), 8 U.S.C. § 1101(a)(15).

[15] Id. § 101(a)(15)(B, F, H), 8 U.S.C. § 1101(a)(15)(B, F, H).

[16] Id. § 101(a)(15); 8 U.S.C. § 1101(a)(15).

[17] See id. §§ 101(a)(20), 241(a), 8 U.S.C. §§ 1101(a)(20), 1251(a). See also notes 20-70 supra and accompanying text.

[18] See Gordon & Rosenfield, note 8 supra, § 2.5b.

[19] There is no quota on certain "immediate relatives" of United States citizens, or on "special immigrants." I. & N. Act § 201(a), 8 U.S.C. § 1151(a). The most significant category of the latter is returning residents. See id. § 101(a)(27), 8 U.S.C. § 1101(a)(27). Special provisions apply to refugees and asylees. See id. §§ 201(a), 207, 209(b), 8 U.S.C. §§ 1151(a), 1157, 1159(b).

Both immigrants and non-immigrants are subject to qualitative exclusions. The Act enumerates thirty-three classes of inadmissible aliens.[25] These exclusion grounds reflect an assortment of congressional concerns -- economic, criminal, moral, ideological, and medical.

The Act also contains a number of provisions for waiving certain exclusion grounds. Some such waivers are automatic; they make specified exclusion grounds inapplicable once specified prerequisites have been met.[26] Others provide only that, if certain facts exist, the Attorney General has the discretion to waive designated exclusion grounds.[27]

Analogous provisions govern deportation. The Act sets out nineteen categories of deportable aliens.[28] Though slightly less expansive in their reach, these deportation grounds generally reflect the same concerns as the exclusion grounds. As with exclusion, certain deportation grounds are subject to either automatic[29] or discretionary[30] waivers when certain conditions are met.

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[20] Id. §§ 201(a), 202(a), 8 U.S.C. §§ 1151(a), 1152(a).

[21] Although the percentages assigned to the six preference categories add up to 100%, it is theoretically possible to award spots to non-preference immigrants if the preference categories do not fill up. I. & N. Act § 203(a)(7), 8 U.S.C. § 1153(a)(7). In practice, however, all six preference categories have been oversubscribed since 1977; non-preference visas are not expected to be available in the near future unless the statute is amended. See Steel, note 8 supra, § 9.2.

[22] I. & N. Act § 203(a)(1, 2, 4, 5), 8 U.S.C. § 1153(a)(1, 2, 4, 5).

[23] Id. § 203(a)(3, 6), 8 U.S.C. § 1153(a)(3, 6).

[24] Id. § 203(c), 8 U.S.C. § 1153(c).

[25] Id. § 212(a), 8 U.S.C. § 1182(a).

[26] E.g., id. §§ 212(b, d(1), d(2), d(9), d(10), g), 243 (h), 8 U.S.C. §§ 1182(b, d(1), d(2), d(9), d(10), g), 1253(h). In addition, several of the exclusion grounds contain built-in exceptions. See, e.g., § 212(a)(9, 16, 17, 22, 24, 25, 28(E, I)), 8 U.S.C. § 1182(a)(9, 16, 17, 22, 24, 25, 28(E, I)).

[27] E.g., id. §§ 212(c, d(3), d(4), d(8), h, i, k), 213, 8 U.S.C. §§ 1182(c, d(3), d(4), d(8), h, i, k), 1183.

[28] Id. § 241(a), 8 U.S.C. § 1251(a).

The Initial Decisionmaking Process

Several government Departments have roles in administering the Immigration and Nationality Act. They include the Departments of State,[31] Labor,[32] and Health and Human Services.[33] Principal responsibility, however, rests with the Attorney General,[34] who in turn has delegated broad powers to the Immigration and Naturalization Service (INS)[35] and to the Executive Office for Immigration Review (EOIR).[36]

The Justice Department renders a host of different, immigration-related, adjudicative decisions. Two of them -- exclusion and deportation -- have already been noted. But a number of collateral decisions are also required. When an alien wishes to immigrate on the basis of either family ties or occupational qualifications, the first step is to file a "visa petition" to establish the facts bringing the alien within the statutory preference (but not necessarily guaranteeing ultimate admission, which will require satisfaction of all the other quantitative and qualitative conditions described earlier).[37] Once approved, visa petitions can be revoked for various reasons.[38] Aliens may apply for waivers of certain exclusion or deportation grounds, as discussed above. Decisions are needed whether to detain aliens pending either exclusion or deportation proceedings;[39] whether to require the posting of bond and, if so, in what amount;[40] whether to revoke bond;[41] whether to reopen or reconsider exclusion or deportation decisions already made;[42] and whether to stay temporarily the execution of exclusion or deportation orders.[43]

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[29] Id. §§ 241(b)(1, 2), 243(h), 8 U.S.C. §§ 1251(b)(1, 2), 1253(h). Some of the deportation grounds also contain internal exceptions. See, e.g., § 241(a)(3, 5, 6(E), 7, 8, 10), 8 U.S.C. § 1251(a)(3, 5, 6(E), 7, 8, 10).

[30] Id. §§ 241(f)(1), 241(f)(2), 244(a), 244(e), 245, 249, 8 U.S.C. §§ 1251(f)(1), 1251(f)(2), 1254(a), 1254(e), 1255, 1259.

[31] The principal role of the State Department is in issuing visas. Id. § 104, 8 U.S.C. § 1104; 22 C.F.R. §§ 41, 42 (1985). See also I. & N. Act § 105, 8 U.S.C. § 1105 (national security information); 22 C.F.R. § 46 (1985)(control of alien departures).

[32] The Labor Department passes on applications for labor certification, a document needed by certain aliens entering to perform labor. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14); 20 C.F.R. §§ 655, 656 (1985). See Rubin & Mancini, An Overview of the Labor Certification Requirements for Intending Immigrants, 14 San Diego L. Rev. 76 (1976).

[33] The Public Health Service examines entering aliens for possible medical disqualifications. I. & N. Act § 234, 8 U.S.C. § 1224.

[34] Id. § 103, 8 U.S.C. § 1103.

[35] See 8 C.F.R. §§ 2.1 (delegation to Commissioner of I.N.S.), §§ 100 et seq. (delegation by Commissioner to subordinates within I.N.S.)(1985).

[36] See id. § 3.

Nor are immigration-related decisions confined to the realm of exclusion and deportation. Permanent resident aliens file "preliminary applications" for favorable administrative recommendations as to eligibility for naturalization.[44] A nonimmigrant who is present in the United States and who meets specified statutory conditions may apply for "adjustment of status" to lawful permanent residence.[45] Adjustment of status, once granted, may be rescinded within five years.[46] A non-immigrant alien may apply for a change to another non-immigrant category,[47] or for an extension of stay,[48] or for permission to work.[49] An alien student may apply for permission to transfer to another INS-approved school.[50] A school may apply to be included on the list of approved institutions,[51] or it may be necessary to withdraw a school approval previously granted.[52] Administrative fines and other penalties may be levied against commercial carriers who violate the immigration laws.[53]

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[37] I. & N. Act § 204(a), 8 U.S.C. § 1104(a); 8 C.F.R. § 204 (1985); 22 C.F.R. §§ 42.41, 42.42 (1985). The visa petition is actually just a preliminary to the visa application, which is made to the appropriate American consulate abroad. See I. & N. Act §§ 221, 222, 8 U.S.C. §§ 1201, 1202. Approval of the visa application, in turn, is ordinarily a necessary, id. § 212(a)(20, 26), 8 U.S.C. § 1182(a)(20, 26), but not sufficient, id. § 221(h), 8 U.S.C. § 1201(h), condition for admission. Having arrived at the border with a visa, the alien must again establish admissibility. Id.

[38] Id. § 205, 8 U.S.C. § 1155; 8 C.F.R. § 205 (1985).

[39] I. & N. Act §§ 212(d)(5), 235(b), 8 U.S.C. §§ 1182(d)(5), 1225(b); 8 C.F.R. § 235.3(b, c) (1985)(detention versus parole for aliens in exclusion proceedings); I. & N. Act § 242(a), 8 U.S.C. § 1252(a), 8 C.F.R. § 242.2(b) (1985) (detention versus release for aliens in deportation proceedings).

[40] I. & N. Act §§ 237(d)(exclusion proceedings), 242(a) (deportation proceedings), 8 U.S.C. §§ 1227(d), 1252(a). See 8 C.F.R. §§ 237.1, 242.2(b) (1985).

[41] I. & N. Act § 242(a), 8 U.S.C. § 1252(a); 8 C.F.R. § 242.2(c) (1985).

[42] 8 C.F.R. §§ 3.2, 3.8, 103.5, 242.22 (1985).

[43] I. & N. Act § 237(d), 8 U.S.C. § 1227(d); 8 C.F.R. §§ 237.1 (exclusion), 243.4 (deportation) (1985).

[44] I. & N. Act § 334, 8 U.S.C. § 1445, 8 C.F.R. § 334 (1985).

[45] I. & N. Act § 245, 8 U.S.C. § 1255; 8 C.F.R. § 245 (1985).

Those are just some of the adjudications that arise under the Immigration and Nationality Act. Who performs them?

Virtually all of the initial adjudicative immigration decisions made by the Justice Department are assigned initially to either of two types of officials. Certain decisions are made by "special inquiry officers," known also as "immigration judges."[54] Previously part of the I.N.S., immigration judges were transferred in 1983 to the newly created Executive Office for Immigration Review.[55] All the immigration judges are attorneys,[56] and their only responsibility is the adjudication of cases. They conduct relatively formal, evidentiary, adversarial hearings.[57]

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[46] I. & N. Act § 246(a), 8 U.S.C. § 1256(a); 8 C.F.R. § 246 (1985).

[47] I. & N. Act § 248, 8 U.S.C. § 1258; 8 C.F.R. § 248 (1985).

[48] 8 C.F.R. §§ 214.1, 214.2 (1985).

[49] Id. § 214.2(f)(9)(ii).

[50] Id. §§ 214.2(f)(7)(iv), 214.2(f)(8).

[51] I. & N. Act § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.3 (1985).

[52] I. & N. Act § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.4 (1985).

[53] I. & N. Act §§ 271, 272, 273, 8 U.S.C. §§ 1321, 1322, 1323; 8 C.F.R. § 280 (1985).

[54] The statute uses the term "special inquiry officer." See, e.g., I. & N. Act §§ 235, 236, 242(b), 8 U.S.C. §§ 1225, 1226, 1252(b). The regulations use both terms, synonymously. 8 C.F.R. § 1.1(l) (1985).

[55] Before the move, many prominent immigration authorities had objected strenuously to the location of the immigration judges within the I.N.S., which is one of the two adversarial parties appearing before them in each case. See especially Roberts, Proposed: A Specialized Statutory Immigration Court, 18 San Diego L. Rev. 1, 8-12 (1980); Levinson, A Specialized Court for Immigration Hearings and Appeals, 53 Notre Dame Lawyer 644, 645-47 (1981).

[56] Roberts, note 55 supra, at 8.

Almost all other initial adjudicative immigration decisions of the Justice Department are made in the names of the "district directors." These officials have the principal responsibilities for the administration and enforcement of the immigration laws within their local geographic districts.[58] In practice, the adjudicative functions of the district directors are performed by subordinate "immigration examiners," who utilize informal procedures that in some cases include personal interviews with the affected parties.[59] Cases that in the view of the I.N.S. do not require personal interviews are now commonly transferred to "regional adjudications centers," or "RAC's," where they are processed by anonymous immigration officers whose sole function is adjudication.[60] These officers, like their counterparts in the main district offices, are not normally attorneys.

How are the various adjudicative decisions allocated between the immigration judges and either the district directors or their subordinates? By statute, both exclusion and deportation orders are issued by immigration judges after evidentiary hearings.[61] Apart from those decisions, however, the statute does not constrain the Attorney General's power to select the officials to whom adjudicative responsibilities may be delegated.

The Attorney General's regulations assign to the immigration judges not only the exclusion and deportation decisions themselves, but also the decisions whether to grant certain applications for either automatic or discretionary waivers of exclusion or deportation.[62] Some of these applications may be made only to immigration judges, in exclusion or deportation proceedings.[63] Others may be renewed before immigration judges after denials by district directors.[64]

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[57] See I. & N. Act §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b); 8 C.F.R. §§ 236, 242.8-242.20 (1985).

[58] 8 C.F.R. § 100.2(e) (1985). The district directors report to the regional commissioners, id., who in turn report to the Commissioner. Id. § 100.2(d). A few district directors serve overseas; they report to the Executive Associate Commissioner. Id. § 100.2(e).

[59] See, e.g., id. §§ 204.1(d)(4) (visa petitions based on occupational preferences), 208.6 (asylum applications), 245.8 (applications for adjustment of status).

[60] See letter of Harriet B. Marple, Assistant Commissioner, Adjudications, I.N.S. (May 16, 1985), reproduced in 62 Interpreter Releases 543, at 543, 544 (June 7, 1985). There is one RAC in each of the four I.N.S. regions. Id. See also the detailed description of procedures employed at the RAC for the Eastern Region. 62 Interpreter Releases 827 (Aug. 30, 1985).

[61] I. & N. Act §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b).

[62] E.g., 8 C.F.R. §§ 236.3, 236.4, 242.8(a), 242.17 (1985).

Immigration judges also decide whether aliens should be detained, released on bond, or released on their own recognizance pending deportation proceedings.[65] They decide whether to rescind grants of adjustment of status to permanent residence.[66] And, although in practice such cases seldom occur, immigration judges decide whether to withdraw the names of schools from the list of approved institutions that alien students may be admitted into the United States to attend.[67]

Virtually all other adjudicative decisions made by the Justice Department in immigration cases are assigned to district directors or their subordinates.[68] They run the gamut from such significant decisions as visa petitions and adjustment of status[69] to less important decisions such as extensions of stays for non-immigrants.[70]

Administrative Review

Most[71] of the major administrative decisions made under the Immigration and Nationality Act are subject to some form of administrative review. Within the Department of Justice,[72] immigration appeals are channeled to two different reviewing bodies: the Board of Immigration Appeals and the Associate Commissioner for Examinations.

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[63] *Id.* § 242.17(e).

[64] *Id.* §§ 208.9, 208,10 (asylum), 236.4, 242.17(a), 245.2(a)(4) (adjustment of status); 249.2 (registry).

[65] *Id.* § 242.2(b).

[66] *Id.* § 246.4-246.6.

[67] *Id.* § 214.4(d)-214.4(i).

[68] See the regulations cited in notes 37-53 *supra*.

[69] *See* 8 C.F.R. §§ 204 (visa petitions), 245.2 (adjustment of status) (1985).

[70] *Id.* §§ 214.1, 214.2.

[71] The principal exception is the consular decision denying a visa. *See* note 72 *infra*.

[72] Other Departments also make some important immigration decisions. Within the Labor Department, decisions by Certifying Officers denying applications for labor certification are appealable to the Department's ALJ's. 20 C.F.R. § 656.26 (1985). Within the State Department, consular officers' decisions denying visa applications are not presently subject to any formal administrative review, although non-binding advisory opinions can be obtained from the Visa Office. 22 C.F.R. § 42.130(c) (1985). For general discussion of the reviewability of visa denials, see *Aleinikoff & Martin*, note 8 *supra*, at 205-12; Gordon, *The Need to Modernize our Immigration Laws*, 13 San Diego L. Rev. 1, 9-10 (1975) (recommending Board of Visa Appeals); Legomsky, *Immigration and the Judiciary: Law*

The Board of Immigration Appeals (B.I.A.) was created in 1940 by the Attorney General's regulations.[73] It is now located within the Justice Department's Executive Office for Immigration Review.[74] The Board has five members,[75] all attorneys, all of whom normally participate in every case.[76] They are assisted by a staff that includes, at present, 24 attorney examiners[77] and a chief attorney examiner.[78] Reviewing de novo,[79] the B.I.A. decides cases on the basis of the administrative record, supplemented on occasion by oral argument that the B.I.A. has the discretion to grant.[80] The B.I.A. selects, for publication, precedent decisions that will

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72. (continued) and Politics in Britain and America, ch. II, § A (to be published in 1986); Rosenfield, Consular Nonreviewability, 41 A.B.A.J. 1109 (1955); Wildes, Review of Denial of Visa, 142 N.Y.L.J. Nos. 96-98 (1959); Note, Judicial Review of Visa Denials: Reexamining Consular Nonreviewability, 52 N.Y.U. L. Rev. 1137 (1977).

[73] 5 Fed. Reg. 3503 (Sept. 4, 1940), adding 8 C.F.R. §§ 90.2-90.12 (1940). The Board did, however, have predecessors in the Departments previously responsible for enforcing the immigration laws. See Roberts, The Board of Immigration Appeals: A Critical Appraisal, 15 San Diego L. Rev. 29, 33-34 (1977). See also Goodman, note 10 supra.

[74] 8 C.F.R. §§ 3.0-3.8 (1985).

[75] Id. § 3.1(a)(1).

[76] Interview with David B. Holmes, Chief Attorney Examiner, B.I.A., & Gerald S. Hurwitz, Counsel to the Director of the E.O.I.R. (June 12, 1985).

[77] Id.

[78] The Chief Attorney Examiner may serve as an alternate Board member. 8 C.F.R. § 3.1(a)(2) (1985).

[79] See, e.g., Noverola-Bolaina v. I.N.S., 395 F.2d 131, 138 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960). This is true even on questions of witness credibility, Matter of Vilanova-Gonzalez, 13 I. & N. Dec. 399, 403 (B.I.A. 1969), although in practice the B.I.A. ordinarily defers to the credibility determinations of the immigration judge, who has had the opportunity to observe the demeanor of the witnesses, Matter of Wong, 12 I. & N. Dec. 733, 735 (B.I.A. 1968); Matter of T., 7 I. & N. Dec. 417, 419 (B.I.A. 1957). Agencies operating under A.P.A. hearing procedure view the findings of administrative law judges in a similar manner. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495 (1951).

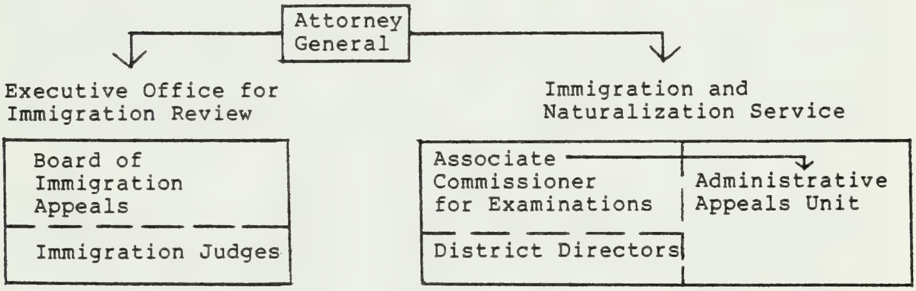
[80] See 8 C.F.R. §§ 3.1(e), 3.5 (1985).

bind the I.N.S. and the immigration judges.[81] In theory, B.I.A. decisions may be reviewed by the Attorney General upon his or her own motion or upon the request of the Chairperson of the B.I.A., a majority of its members, or the Commissioner of the I.N.S.;[82] in practice, such review is rare.

The Associate Commissioner for Examinations, unlike the B.I.A., has broad administrative and policymaking responsibilities.[83] The appellate jurisdiction of the Associate Commissioner is exercised by the Administrative Appeals Unit (A.A.U.). This unit consists of five "appellate examiners" and a Chief of the Unit, none of whom is an attorney. Each case is considered *de novo* by one of the appellate examiners and reviewed by the Chief, whose decision prevails in the event of a conflict. The resolution by the Chief is normally final, since personal involvement by the Associate Commissioner is a rarity.[84] All decisions are made on the administrative record, together with oral argument in the discretion of the A.A.U.[85] Decisions are very infrequently published.

Here, then, are the principal Justice Department units with adjudicative roles in immigration:

IMMIGRATION ADJUDICATION
IN THE JUSTICE DEPARTMENT


Attorney General
Executive Office for Immigration Review
Immigration and Naturalization Service
Board of Immigration Appeals
Immigration Judges
Associate Commissioner for Examinations
Administrative Appeals Unit
District Directors

Two very different processes for reviewing the initial adjudications are thus in place. The B.I.A. is a multi-member body composed of attorneys who perform only adjudicative functions. The Associate Commissioner for Examinations is a policymaking official in whose name decisions are made by single non-attorneys. How are the initial decisions described earlier distributed between these two appellate processes?

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[81] *Id.* § 3.1(g).

[82] *Id.* § 3.1(h).

[83] The authority of the Associate Commissioner for Examinations is described in *id.* § 103.1(f) (1985).

[84] Interview with Lawrence J. Weinig, Chief, Administrative Appeals Unit (June 12, 1985).

[85] *Id.*

Almost all[86] decisions by immigration judges -- exclusion, deportation,[87] bond/detention, and rescission of adjustment of status -- are appealable to the B.I.A.[88] For district director decisions, however, generalizations are difficult. Some district director decisions are not administratively appealable at all.[89] Some others are not technically "appealable," but the applications may be renewed in subsequent exclusion or deportation proceedings and then, if necessary, reviewed by the B.I.A. in appeals from any resulting exclusion or deportation orders.[90]

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[86] There are only two apparent exceptions. Immigration judges' decisions in proceedings to withdraw the approval of schools are appealable to the Associate Commissioner for Examinations. 8 C.F.R. § 103.1(f)(2)(ix) (1985). And, when an immigration judge in deportation proceedings grants voluntary departure and allows the alien 30 days or more in which to leave, the alien may not appeal on the ground that the period was too short. Id. § 3.1(b)(2). Maurice Inman, the I.N.S. General Counsel, has proposed removing all voluntary departure decisions, as well as bond decisions, from the immigration judges and giving the district directors unreviewable authority in those cases. See Inman, Recent Developments at the Justice Dept., Speech to American Immigration Lawyers Ass'n, June 1985.

[87] Deportation orders accounted for 61% of B.I.A. dispositions in fiscal year 1984. See Appendix, infra. Visa petition denials, noted below, constituted another 20%, exclusion cases 10%, and bond determinations 6%. Other categories added up to only 3%. Id.

[88] 8 C.F.R. § 3.1(b)(1, 2, 7, 8) (1985).

[89] E.g., denials of applications by non-immigrants for extensions of stay, id. § 214.1(c)(4), denials by district directors of applications to extend the voluntary departure periods specified by immigration judges, id., § 244.2, and denials of applications for changes of non-immigrant status, id. § 248.3(f).

[90] E.g., asylum, id. §§ 208.8(c), 208.9, and adjustment of status, 245.2(a)(4). A proposed amendment to id. § 3.1(b)(3), however, would provide similar treatment for applications to district directors for discretionary relief under I. & N. Act § 212(c), 8 U.S.C. § 1182(c). At present, the B.I.A. has direct appellate jurisdiction over district director denials of those applications. See 50 Fed. Reg. 25994-95 (June 24, 1985); see also notes 350-62 infra; cf. 8 C.F.R. § 243.4 (1985)(denial of stay of deportation is not appealable, but either immigration judge or B.I.A. may subsequently stay deportation during pendency of motion to reopen or reconsider).

Still other district director decisions are appealable to the B.I.A. directly. They include denials of "212(c) applications," by which certain aliens domiciled in the United States seven years or longer may obtain discretionary relief from either exclusion or deportation;[91] decisions imposing administrative fines;[92] denials of most, but not all, of the visa petitions that are based on family preference;[93] and denials of applications by non-immigrants to waive various exclusion grounds.[94]

Twenty-five other categories of district director decisions are appealable to the Associate Commissioner for Examinations.[95] Numerically the most significant of these are decisions denying those visa petitions, filed by both immigrants and non-immigrants, that are based on occupational preference.[96] The next largest category comprises district director decisions finding breaches of bond conditions.[97] Appeals from denials of applications for certain discretionary waivers of either exclusion or deportation are also assigned to the Associate Commissioner.[98]

Judicial Review

The Immigration and Nationality Act contains no fewer than four provisions governing judicial review of administrative action. By far the most important is section 106(a), which by its own terms is the exclusive vehicle for reviewing "all final orders of deportation . . . pursuant to administrative proceedings under section 242(b) of this Act [the provision detailing the administrative hearing procedure for deportation cases] . . . ."[99] The prescribed procedure is the filing of a petition for review in the court of appeals.[100] Service of the petition automatically stays the deportation unless the court directs otherwise.[101] To minimize delays, the statute codifies the principle of res judicata[102] and requires that the petition be filed within six months after the deportation order becomes administratively final.[103] Except when the petitioner makes a non-frivolous claim of U.S. nationality,[104] the court of appeals reviews the case on the basis of the administrative record.[105]

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[91] See I. & N. Act § 212(c), 8 U.S.C. § 1182(c); 8 C.F.R. § 3.1(b)(3) (1985). But see note 90 supra.

[92] 8 C.F.R. § 3.1(b)(4) (1985).

[93] Id. § 3.1(b)(5).

[94] Id. § 3.1(b)(6).

[95] Id. § 103.1(f)(2) grants appellate jurisdiction to the Associate Commissioner for Examinations in 26 categories of cases. All but one, id. § 103.1(f)(2)(ix), are district director decisions.

[96] These are applications filed under I. & N. Act § 203(a)(3, 6), 8 U.S.C. § 1153(a)(3, 6) (occupational preferences for immigrants), and id. § 101(a)(15)(H, L), 8 U.S.C. § 1101(a)(15)(H,L) (temporary workers). In fiscal year 1984, these categories together accounted for 1428 of the 2649 cases completed by the Administrative Appeals Unit. See Appendix, infra.

[97] 8 C.F.R. § 103.1(f)(2)(i) (1985). In fiscal year 1984, bond breaches accounted for 822 of the 2649 cases completed. See Appendix, infra.

[98] See, e.g., 8 C.F.R. § 103.1(f)(2) (iii, v, vi, vii) (1985).

The most difficult interpretation problem raised by section 106(a) has been the meaning of the phrase "final orders of deportation." As discussed earlier, the statute and regulations require a host of miscellaneous decisions that either affect or flow from the deportation decision itself. Which of these collateral orders, if any, are reviewable in the courts of appeals?

The enactment of section 106(a) in 1961 triggered a flurry of jurisdictional litigation that has only recently begun to subside.[106] It is now clear that an order made during the course of the deportation proceeding -- typically, a disposition of an application for discretionary relief -- is part of the deportation order and thus reviewable exclusively in the court of appeals.[107] So, too, is the denial of a motion to reopen a deportation proceeding.[108] Although the Supreme Court seemed to hold early on that no other collateral order would qualify,[109] it recently announced in I.N.S. v. Chadha that the court of appeals would also have jurisdiction to review "all matters on which the validity of the final order is contingent" -- whether or not the determinations were made at the hearing.[110] How literally the lower courts will construe that language is not yet known.[111]

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[99] 8 U.S.C. § 1105a(a). Section 242(b) is codified as 8 U.S.C. § 1252(b).

[100] Section 106(a) incorporates by reference the procedure contained in the Hobbs Act, now codified as 28 U.S.C. ch. 158 (§§ 2341 et seq.). Venue is in the circuit in which the deportation hearing was held or that in which the petitioner resides. I. & N. Act § 106(a)(2), 8 U.S.C. § 1105a(a)(2).

[101] Id. § 106(a)(3), 8 U.S.C. § 1105a(a)(3).

[102] Id. § 106(c), 8 U.S.C. § 1105a(c).

[103] Id. § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

[104] In that case, if the court of appeals discovers any genuine issue of material fact, it must remand to the district court for a de novo trial on the issue of nationality. Id. § 106(a)(5), 8 U.S.C. § 1105a(a)(5). See Agosto v. I.N.S., 436 U.S. 748 (1978).

[105] Id. § 106(a)(4), 8 U.S.C. § 1105a(a)(4).

[106] See generally Aleinikoff & Martin, note 8 supra, ch. 7, § B; Goodman, Judicial Review of Deportation Orders (Report to A.C.U.S., Preliminary Draft, March 7, 1973); Gordon & Rosenfield, note 8 supra, ch. 8; Steel, note 8 supra, §§ 14.51, 14.52; Note, Judicial Review of Final Orders of Deportation, 42 N.Y.U. L. Rev. 1155 (1967); Note, Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals, 65 Va. L. Rev. 403 (1979); Comment, Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts, 71 Yale L. J. 760 (1962).

A second judicial review provision is an exception to the one just discussed. To avoid possible constitutional problems,[112] the statute allows an alien "held in custody" under a deportation order to obtain judicial review by habeas corpus in the district court.[113] The courts have disagreed over the breadth of the term "custody" and over the scope of the resulting review once custody is established.[114]

A third provision authorizes judicial review of final exclusion orders "by habeas corpus and not otherwise."[115] As with deportation, there is some uncertainty whether an alien

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107. Foti v. I.N.S., 375 U.S. 217 (1963); Che-Li Shen v. I.N.S., 749 F.2d 1469, 1472 (10th Cir. 1984).

108. Giova v. Rosenberg, 379 U.S. 18 (1964). But see Young v. United States Dept. of Justice, 759 F.2d 450, 457 (5th Cir. 1985)(court of appeals lacks jurisdiction to review denial of motion to reopen bond hearing).

109. Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968).

110. 103 S.Ct. 2764, 2777 (1983).

111. Even when the validity of the challenged order is a predicate for the ultimate deportation order, court decisions have tended to turn on whether an evidentiary hearing would be required. See Abedi-Tajrishi v. I.N.S., 752 F.2d 441 (9th Cir. 1985); Mohammadi-Motlagh v. I.N.S., 727 F.2d 1450 (9th Cir. 1984). Quaere whether the Supreme Court's recent decision in Florida Power and Light Co. v. Lorion, 105 S.Ct. 1598 (1985), deemphasizing the relevance of the need for a further evidentiary hearing, endangers the more restrictive holdings. See notes 184-98 infra and accompanying text.

112. See notes 259-67 infra and accompanying test.

113. I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9).

114. See Aleinikoff & Martin, note 8 supra, ch. 7, § E (contrasting United States ex rel. Marcello v. District Director, 634 F.2d 964 (5th Cir. 1981) with Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981) and analyzing other recent cases). See also Steel, note 8 supra, at 463 & n.11.

115. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b).

must be detained in order to obtain review.[116]

A final judicial review provision is a catchall. Section 279 of the Act invests the district courts with "jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title."[117] This section has been used to review denials of visa petitions, adjustment of status, extensions of stay, various applications for discretionary relief from exclusion or deportation, and many other miscellaneous decisions.[118] It has, however, two major limitations: It cannot be used to obtain review of deportation or exclusion orders because of the exclusivity clauses contained in the more specific judicial review provisions discussed above.[119] And it is limited to cases arising under "this title," a problem considered below.[120]

II

Choosing a Review Forum: General Criteria

This section attempts to formulate general criteria for determining in what forum a given class of administrative decisions should be reviewed. To put the question another way, how can the attributes of a given class of cases be most sensibly matched with the attributes of a given administrative or judicial reviewer?

To answer that question, one must first identify the sometimes competing goals inherent in selecting a review forum. Once that is done, the possible forum choices must be identified and their relevant distinguishing characteristics isolated.

Forum characteristics are of two types. A forum has certain objective features that I shall describe as primary attributes. Flowing from these are secondary attributes more subjective in nature. The latter qualities reflect more visibly the advantages and disadvantages of placing the review function in the particular forum. They are the qualities that advance or impede the stated goals of the forum selection process.

Whether the advantages of a particular review forum outweigh the disadvantages depends on the type of case for which review

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116. See note 290 infra.

117. 8 U.S.C. § 1329.

118. These and many other orders reviewed under section 279 are listed in Gordon & Rosenfield, note 8 supra, at 8-167 to 8-170.

119. Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981).

120. See notes 479-88 infra and accompanying text.

is contemplated. My ultimate aim in this section, therefore, is to identify those attributes of cases that favor the selection of a review forum with particular forum attributes. Once the case attributes that point toward particular forum choices have been articulated, they can be used to determine in what administrative or judicial tribunals, if any, a given class of cases should be reviewed.

Goals in Selecting a Forum

Review, whether administrative or judicial, is but one component of the overall adjudication process. Among the goals of a review system, therefore, are those associated generally with administrative procedure. Roger Cramton suggested,[121] and others have refined,[122] three factors for evaluating an administrative process: accuracy, efficiency, and acceptability. Accuracy is the truth-finding function.[123] Efficiency reflects not only the monetary costs to the parties and to society, but also the waiting time and the decision-makers' time.[124] Acceptability rests on the perceptions of the litigants themselves and on those of the general public.[125] These goals, naturally, can point in opposite directions.

Consistency should be viewed as a fourth goal of administrative procedure. It overlaps partly, but not entirely, with the other three. One benefit of consistency is to enhance stability. Conflicts among equally authoritative bodies have ways of becoming reconciled eventually, either by gradual evolution or by pronouncements from above. Therefore, the mere presence of a momentary conflict can create at least the perception of imminent change. The result can be to leave affected sectors of the population uncertain how to plan for the future. To that extent, the benefits of consistency can possibly be subsumed within the general rubric of acceptability (to the public).[125A] As discussed later, coherence takes on particular importance when policy questions are at issue.[126]

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[121] Cramton, _Administrative Procedure Reform: The Effects of S.1663 on the Conduct of Federal Rate Proceedings_, 16 Ad. L. Rev. 108, 111-12 (1963).

[122] _E.g._, Cass, note 1 _supra_, at 154-57; _Currie & Goodman_, note 1 _supra_, at 4.

[123] _Cramton_, note 121 _supra_, at 112.

[124] _Cass_, note 1 _supra_, at 155.

[125] _Cramton_, note 121 _supra_, at 112.

[125A] For reasons given in note 127 _infra_, however, the acceptability goal seems unlikely to cover even this component of consistency.

[126] _See_ note 160 _infra_; _see also_ text accompanying note 175 _infra_; notes 444-78 _infra_ and accompanying text.

Consistency is important for another reason. For a difference of opinion to arise, at least two bodies had to have considered the same issue. There are certainly benefits in this type of maturation process, but the cost includes duplication of effort. That factor goes to the general goal of efficiency.

But a third reason for valuing consistency is that it assures equal treatment of similarly situated litigants. This factor does not fit neatly within any of the three traditional goals of administrative procedure.[127] Consistency -- or at least equality -- might thus be visualized best as a fourth, independent, goal.

Each of those four general goals is important at two levels that correspond to what have traditionally been described as the dual functions of appellate review. Appellate tribunals perform a retrospective error-correcting function concerned only with the outcome of the particular dispute, and a prospective "guidance" function concerned with the future development of the law.[128] This duality means that, for purposes of choosing a review forum, a given goal of administrative procedure can be internally conflicting. The most efficient error-corrector, for example, is not necessarily the most efficient explicator of the law.[129]

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[127] Perhaps it is unnecessary to think of equality as a separate goal; acceptability to the public might be viewed as encapsulating equal treatment. By similar reasoning, however, acceptability could be described as the only goal of administrative procedure, since the public presumably would not tolerate a system sufficiently lacking in either accuracy or efficiency. More likely, Cramton's conception of acceptability was meant to be confined to acceptably fair procedure.

Nor, at least on questions of law, does the accuracy goal necessarily encompass consistency. Unless one accepts the declaratory theory, under which the judicial role is to do nothing more than locate and declare preexisting principles, see, e.g., E.W. Patterson, Jurisprudence--Men and Ideas of the Law 571-77 (1953); R.A. Wasserstrom, The Judicial Decision 12-38 (1961), there cannot be said to be only one "correct" decision on a question of law. Consequently, a split of authority is not irrefutable proof that one of the decisions must be "inaccurate." Of course, although the declaratory theory is currently in disfavor, its repudiation has not been unanimous. See, e.g., the sources cited in R. Stevens, Law and Politics--the House of Lords as a Judicial Body, 1800-1976, at 622-23 (1978).

[128] See, e.g., P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 2-3 (1976); Leonard, The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation, 17 Loyola of L.A. L. Rev. 299, 299-302 (1984); Levinson, note 55 supra, at 649-50 (1981).

Forum Attributes

Those are the major goals of the forum selection process. What choices of forum are available, and what attributes does each forum possess that might be relevant to the attainment of those goals?

At the judicial level, the principal choice in most areas of administrative law is between the district courts and the courts of appeals. There is also the possibility of creating a specialized court, but that subject will be deferred until the final section.[130]

The leading treatment of the optimal forum for judicial review of administrative action is the distinguished study by David Currie and Frank Goodman, prepared in 1975.[131] The authors appraised the advantages and disadvantages of direct review by the courts of appeals and applied their observations to illustrative categories of administrative action.[132] The present section will build on that study. My aims here will be to develop general factors that should influence the weight to be placed on the various advantages and disadvantages, and to relate the whole discussion to analogous problems posed by administrative review.

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[129] At the judicial level, for example, a single district judge might be the most efficient error-corrector, _see_ notes 145-46 _infra_ and acompanying text; Wright, _The Doubtful Omniscience of Appellate Courts_, 41 Minn. L. Rev. 751, 781-82 (1957), at least if the appeal rate is low, _see_ notes 181-83 _infra_ and accompanying text; _Currie & Goodman_, note 1 _supra_, at 18. For reasons considered below, however, a court of appeals will generally be better equipped to harmonize conflicts in the law. _See_ notes 166-67 _infra_ and accompanying text.

[130] _See_ section IV _infra_.

[131] _See_ note 1 _supra_. The study was performed for both the Administrative Conference and the Commission on Revision of the Federal Court Appellate System. _See also_ _Goodman_, note 106 _supra_; 4 K. Davis, _Administrative Law Treatise_ § 23:5 (2d ed. 1983); H. Friendly, _Federal Jurisdiction: A General Review_, part IX (1973); Developments in the Law, _Remedies against the United States and its Officials_, 70 Harv. L. Rev. 827, § 7 (1957).

[132] _See_ especially _Currie & Goodman_, note 1 _supra_, at 31-36 (deportation); _Goodman_, note 106 _supra_ (largely incorporated into _Currie & Goodman_, _supra_).

In analyzing the merits of direct court of appeals review, I shall assume that the alternative is "mandatory" two-tier judicial review: initial review by the district court, with an automatic right of appeal by either party to the court of appeals. A system of one-tier district court review would be possible, but Currie and Goodman demonstrate the insuperable difficulties that such a system would create.[133] Less drastic would be initial review in the district court as of right, followed by further review in the court of appeals only at the discretion of the latter (or, as one variant, at the discretion of either court). Discretionary two-tier review would mitigate some of the problems associated with one-tier review, but it would generate still other problems that impelled Currie and Goodman to caution against its general use.[134] This article accepts that conclusion.

The consequence of adopting mandatory two-tier review is that, in every case reviewed judicially at all, either (a) the district court decision is appealed, in which event both the district court and the court of appeals will have reviewed the same administrative decision; or (b) the district court decision becomes final. When an appeal is taken, the question is what was gained by district court review. The usual reason for direct court of appeals review is that the district court would otherwise be performing a function that was either unimportant or duplicative of what the agency had already done.[135] In contrast, when no appeal is taken and the district court decision stands, the question is not whether two courts are better than one, but which of the two courts possesses attributes more conducive to reviewing the particular type of case. The predicted frequency of these two scenarios is itself a factor bearing on choice of forum.[136] The point here, however, is that either scenario requires a comparison of the qualities of the two courts.

What, then, are the primary, objective, features that distinguish courts of appeals from district courts in ways relevant to the broad goals discussed earlier? One primary distinguishing attribute is that courts of appeals are collegial bodies; they normally work in three-judge panels.[137] Another is that appointments to courts of appeals are generally viewed as more prestigious.[138] Third, courts of appeals are fewer in number than are district courts.

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[133] Currie & Goodman, note 1 supra, at 15 to 16 (main disadvantage would be inconsistent rulings).

[134] Id. at 19-23 (advantages exist but are outweighed by disadvantages of inconsistency, wasted screening time, and delay). For a contrary view, see Friendly, note 131 supra, at 176-77.

[135] Id. at 5-6.

[136] See notes 181-83 infra and accompanying text.

These primary attributes generate five secondary attributes that highlight these courts' strengths and weaknesses as reviewing bodies. For reasons more fully developed by Currie and Goodman, decisions of the courts of appeals tend to be of a higher quality than those of the district courts. The authors stress collegiality,[139] the greater prestige and therefore attractiveness of the positions to people of high caliber,[140] and the judges' experience with the appellate process generally and with opinion-writing in particular.[141] An additional quality factor might be added: The fewer the number of courts reviewing a particular class of cases, the more such cases each of those courts will decide, and thus the more specialized expertise each will acquire. The importance of this factor will vary with the type of subject matter and with the volume of the particular case type in the particular region.

The preceding discussion on the quality of the decision-making goes to the goal of accuracy. For analogous reasons, courts of appeals are objectively seen as superior reviewers, a factor bearing on the goal of acceptability.[142] A third secondary attribute, relevant to the consistency goal, is that courts of appeals, being fewer in number, create fewer conflicts.[143] Deference to agency interpretations reduces the magnitude of this factor.

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[137] See 28 U.S.C. § 46.

[138] Currie & Goodman, note 1 supra, at 12.

[139] Id. at 12. Accord, Carrington, Meador & Rosenberg, note 128 supra, at 10; Views of the Administrative Conference of the United States on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (May 7, 1971), rep'd, 57 Va. L. Rev. 927, 928 (1971) (benefits of collegiality include "diversity of background and experience, an open decision process, and a tendency toward moderation in policy"). Collegiality does, however, have some negative effects on quality. It can impair flexibility, Currie & Goodman, note 1 supra, at 9-11, and can, because of a desire for consensus, produce compromise opinions lacking in clarity or decisiveness, Robinson, On Revamping the Independent Regulatory Agencies, 57 Va. L. Rev. 947, 961-62 (1971) (acknowledging Ash Council criticisms of collegiality but arguing that problems are minimal).

[140] Currie & Goodman, note 1 supra, at 12.

[141] Id. at 13.

[142] Id. at 13-14.

[143] Id. at 15-16; see also 4 Davis, note 131 supra, at 135.

All three of those secondary attributes generally favor court of appeals review. Two others, both bearing on the goal of efficiency, are of mixed effect. Because there are fewer courts of appeals, they are, on the average, geographically farther from the aggrieved parties.[144] The increased distance can elevate travel costs for counsel. Moreover, since it takes three judges to decide the case, the cost to the public will generally be greater.[145] As Currie and Goodman point out, however, there are countervailing considerations: The difference in public expense is much less than might be thought, since a high proportion of the decisionmaking time is consumed by the drafting of the opinion, for which only one of the three judges will generally be responsible.[146] Further, in those cases where district court decisions are appealed, two-tier review is more expensive than direct court of appeals review, both for the individual and for the public.[147]

For administrative review, the major forum choices vary by agency. In the immigration context, the principal alternatives are the Board of Immigration Appeals and the Associate Commissioner for Examinations, described earlier.[148] Since the powers of the latter have been delegated to the Administrative Appeals Unit (A.A.U.), whose decisions the Associate Commissioner has not been known to disturb,[149] the present comparison will actually be between the B.I.A. and the A.A.U.

Several primary attributes distinguish these two bodies. As discussed earlier,[150] the B.I.A. decides all cases collectively; A.A.U. decisions, in contrast, are made by single appellate examiners. B.I.A. positions are more prestigious, and in any event higher-paying, than A.A.U. positions.[151] All B.I.A. members are attorneys; the A.A.U. appellate examiners and unit Chief are not. The B.I.A. is assisted by a staff of 24 attorneys; the appellate examiners in the A.A.U. must do their own legal research, analysis, and drafting of dispositions. The B.I.A. publishes opinions in those cases it considers precedential; A.A.U. opinions are almost never published.

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[144] Currie & Goodman, note 1 supra, at 7-8.

[145] Id. at 9.

[146] Id.

[147] How high the appeal rate must be before direct court of appeals review will save judicial resources is discussed id., at 18-19.

[148] See notes 73-98 supra and accompanying text; see also Goodman, note 10 supra. For commentary on the general subject of agency review boards, see, e.g., Berkemeyer, Agency Review by Intermediate Boards, 26 Ad. L. Rev. 61 (1974); Freedman, Review Boards in the Administrative Process, 117 U. Pa. L. Rev. 546 (1969); see generally Cass, note 1 supra; Note, Intermediate Appellate Review Boards for Administrative Agencies, 81 Harv. L. Rev. 1325 (1968); A.C.U.S. Rec. No. 68-6, 1 C.F.R. § 305.68-6 (1985). A.C.U.S. Rec. No. 83-3, which is based on the Cass report, supra, discusses some of the factors that should guide agency heads in deciding whether to delegate the review function to multi-member boards. See 1 C.F.R. § 305.83-3, Rec. No. 3 (1985).

[149] See note 84 supra.

[150] The B.I.A. and the A.A.U. are described in notes 73-98 supra and accompanying text.

The resulting secondary attributes of the B.I.A. and the A.A.U. are roughly analogous to those that distinguish courts of appeals from district courts, though they do not flow from quite the same set of primary attributes. The quality of the B.I.A. decisions would be expected to exceed that of the A.A.U. decisions[152] because the B.I.A. has the benefits of collegiality, far superior staffing support, and higher ranks and greater prestige that widen the range of people whom the positions can attract. Given the differences in attorney resources, the quality differential would be expected to be especially great when legal issues are presented or when precedent opinions must be drafted. For similar reasons, the B.I.A. is objectively perceived as a better reviewing body,[153] a factor affecting acceptability.

Before 1983, the appellate jurisdiction now entrusted to the Associate Commissioner for Examinations had been distributed geographically among four regional commissioners. The change was made in order to equalize processing times and to enhance the uniformity of the interpretations.[154] The appellate jurisdiction of the Associate Commissioner is now just as centralized, therefore, as that of the B.I.A.

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151. Appellate examiners in the A.A.U. are classified as GS-14 and B.I.A. members as GS-15. The chief of the A.A.U. is classified as GS-15; the present Chairperson of the B.I.A. is in the Senior Executive Service, though partly because he simultaneously occupies the post of Director of the Executive Office for Immigration Review.

152. Several immigration specialists in the private sector expressed to the author their view that in fact the A.A.U. decisions have not attained the same level of quality as the B.I.A. decisions.

153. Interviews with Charles Gordon (June 14, 1985); W. Leiden, note 6 supra; Maurice Roberts (June 14, 1985).

154. 48 Fed. Reg. 43160 (Sept. 22, 1983). The four regions were established in 1955. Now that the regional commissioners are no longer preoccupied with adjudication, the I.N.S. is considering reducing the number of regions to three. See 62 Interpreter Releases No. 23, at 627 (July 12, 1985).

Despite the equal degrees of centralization, however, one primary attribute of the B.I.A. gives it an advantage in promoting uniformity: its practice of designating, and then making available to the public, opinions it regards as precedential. Since its published opinions bind the immigration judges and all I.N.S. officials,[155] and since those opinions are readily accessible,[156] government officials have a means of providing uniform treatment and immigration lawyers have a means of predicting B.I.A. interpretations and counseling their clients accordingly. Analogous observations cannot be made about the A.A.U. because its opinions are very seldom designated as precedent and in any event are not easily accessible to the public.[157] Consequently, the A.A.U. cannot achieve, as effectively as the B.I.A., a nationally uniform application of the immigration laws. Nor, at least with present staffing resources, would the A.A.U. be capable of preparing large numbers of carefully drafted published opinions.

The preceding discussion reveals advantages enjoyed by the Board in its capacity to advance the goals of accuracy, acceptability, and consistency. The tradeoff is its greater operational costs. The collegial decisionmaking process, the higher rank of the adjudicators, and its large support staff make the B.I.A. a far more expensive enterprise than the A.A.U.[158]

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[155] 8 C.F.R. § 3.1(g) (1985).

[156] Precedential decisions of the B.I.A. are published in Administrative Decisions under Immigration and Nationality Laws of the United States (presently 18 volumes supplemented by decisions rendered since publication of the last bound volume). This publication is also where a decision of the Associate Commissioner for Examinations would appear in the unusual event that it were designated as precedent.

[157] The A.A.U. deposits copies of its decisions in the I.N.S. central reading room in Washington, D.C. It also distributes copies to the American Immigration Lawyers Association and to each of three immigration publications. Without a discriminating selection of cases by the A.A.U., however, there is no way to know which, among the mass of cases the A.A.U. decides, it considers precedential. Moreover, neither the immigration judges and immigration examiners who do the initial adjudicating, nor the immigration lawyers who must predict it, have easy physical access to the written decisions. But see the recent paper prepared by the A.A.U. on the subject of third preference (professional) visa petitions. 62 Interpreter Releases 836 (Sept. 6, 1985).

[158] In fiscal year 1984, the B.I.A. decided 3131 cases. See Appendix, infra. That was accomplished by five B.I.A. members, one chief attorney examiner, and 24 staff attorneys.

Since the A.A.U. reports to the Associate Commissioner for Examinations, and since the latter has important administrative and policymaking responsibilities,[159] it might be assumed that the A.A.U. is better equipped than the B.I.A. to make decisions with heavy political components. That factor can be critical in other administrative settings,[160] but in the present context it has little practical import. As noted earlier, the Associate Commissioner in practice does not become involved in adjudication. In addition, since the B.I.A. is subject to review by the Attorney General, the B.I.A. is no less subject to political constraints, and no less likely to be policy-sensitive, than the A.A.U. The B.I.A. is probably no more politically restricted or policy-sensitive either, since as discussed earlier the Attorney General exercises the review power so infrequently.

Two qualifications are necessary. Personnel can change.[161] There is no certainty that future Associate

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158. (continued) *Interview with Holmes and Hurwitz*, note 76 *supra*. In the same fiscal year, the A.A.U. disposed of 2649 cases. *See* Appendix *infra*. That was accomplished by five appellate examiners and the Chief of the unit. *Interview with Weinig*, note 84 *supra*. Thus, the A.A.U. disposed of almost as many cases as the B.I.A., with only a small fraction of the staff. No difference in the difficulty of the cases is apparent.

159. 8 C.F.R. § 103.1(f)(1) (1985).

160. As others have pointed out, preference for a particular review structure often hinges on whether one prefers the judicial or the political model of agency decisionmaking. *See*, *e.g.*, *Cass*, note 1 *supra*, at 117-18, 137; *Freedman*, note 148 *supra*, at 559; *see also* Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 Duke L.J. 163, especially at 182-99. Many writers have urged increased efforts to improve the coherence of agency policy formulation. *See*, *e.g.*, *Freedman*, *supra*; H. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 Col. L. Rev. 1231 (1974). That emphasis underlies in part the view that important policy questions should be subject to agency head control. *See*, *e.g.*, A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3, para. 6 (1985); *Freedman*, *supra*; Gladstone, *The Adjudicative Process in Administrative Law*, 31 Ad. L. Rev. 237, 243 (1979); *Strauss*, *supra*.

161. A new Associate Commissioner for Examinations, Mr. Richard E. Norton, was recently appointed. *See* 62 Interpreter Releases 898 (Sept. 20, 1985).

Commissioners will remain aloof from the A.A.U. adjudication process. Further, even if they do, the public perception might be that the A.A.U. is less independent than the B.I.A., which has greater theoretical insulation[162] and an organizational location outside the I.N.S. Subject to those qualifications, however, a safe general statement is that the chief comparative strengths of the B.I.A. are its greater accuracy, acceptability, and consistency, while the major advantage of the A.A.U. is the lower cost of its operation.

Here is where we are so far:

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[162] *See* especially United States *ex rel*. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (Attorney General, bound by own regulations, may not dictate to B.I.A. how it should decide case). The Attorney General may, however, reverse the B.I.A. decision after it is issued, 8 C.F.R. § 3.1(h) (1985), and may dissolve the Board entirely simply by amending the regulations.

FORUM ATTRIBUTES

Courts of Appeals (relative to district courts)	Board of Immigration Appeals (relative to Administrative Appeals Unit)
Primary Distinguishing Attributes	
1. Collegial decisionmaking	1. Collegial decisionmaking
2. Greater prestige	2. Greater prestige
3. Fewer in number	3. Attorney adjudicators
	4. Attorney staff
	5. Publication of precedents
	6. In theory, less policy-making responsibility; in practice, not.
Secondary Distinguishing Attributes	
1. Higher quality results	1. Higher quality results
2. Perception of superior justice	2. Perception of superior justice
3. Better able to effect uniform application of law	3. Better able to effect uniform application of law
4. Possibly greater monetary cost to public (depends on what appeal rate would otherwise be)	4. Greater monetary cost to public
5. Possibly greater monetary cost to litigants (depends on what appeal rate would otherwise be)	5. In theory, more independence from political officials (not in practice)
	6. Possibly gives greater appearance of impartiality

Case Attributes

Do the advantages of direct review in the courts of appeals outweigh the disadvantages? And do the advantages of the B.I.A. outweigh those of the A.A.U.? The answer to each question is that it all depends on the attributes of the particular class of cases. But what kinds of attributes are relevant?

(1) Impact on the litigants.

Like other procedural decisions,[163] choice of forum must reflect the practical impact that the outcome of the case will have on the parties.[164] The greater the expected impact on both the individual and the public, the more important it becomes to assure accurate decisionmaking. For reasons given earlier, that goal usually suggests administrative review in the B.I.A. and judicial review in the courts of appeals when the potential impact is great.

Impact is a factor for other reasons as well. The greater the stakes, the more critical it is that justice be seen to be done. A high impact therefore points toward choosing the courts of appeals, where there is reason for litigants to perceive greater attention to their cases than in the district courts, and toward the B.I.A., where there is reason for litigants to perceive both greater attention and greater independence than in the A.A.U.

A great impact also accentuates the need to promote uniformity. Two of the interests that uniformity serves -- predictability and equality -- assume greater importance when the stakes are high. The B.I.A. and the courts of appeals are better able to produce uniform results than are the A.A.U. and the district courts.

Finally, the chief disadvantage of the B.I.A. as compared with the A.A.U., and that of the courts of appeals relative to the district courts, is the greater monetary cost to the public. The procedural costs that the system should be willing to tolerate depend on the magnitude of the interests at stake.

All these considerations suggest that a high impact is a factor favoring review in the B.I.A. and in the courts of appeals. With respect to the courts of appeals, however, two caveats are necessary.

First, since courts of appeals are, on the average, geographically more isolated, travel costs of counsel are generally greater. Just as the magnitude of the impact affects the cost level that the system as a whole should be willing to absorb, so too would it be expected to influence the level of resources that the litigants are willing to invest to obtain review. Willingness and ability are two different things, however, and when the personal stakes are great, pricing judicial review beyond the means of the litigants would be intolerable.

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[163] See generally Verkuil, note 9 supra.

[164] See Currie & Goodman, note 1 supra, at 15.

Second, again only with respect to the question of judicial review, almost all the above considerations apply in reverse if the consequence of placing original jurisdiction in the district courts turns out to be a very high rate of appeals to the courts of appeals. When both courts review the administrative decision, the case receives more, not less, attention than if review had originated in the court of appeals. The objective perception of fair procedure would also seem greater, as would both the cost to the public and the cost to the litigants.

(2) Types of issues cases tend to raise.

The issues raised in administrative adjudication have traditionally been grouped as legal, factual, or discretionary. Difficulties inherent in classifying borderline cases have not proved easy to resolve. Important contributions have been made,[165] however, and remaining problems at the edges have not prevented either the conscious or intuitive use of those distinctions in cases whose categorization is clear cut.

While the law/fact/discretion distinction is of principal relevance to scope of review, it bears also on forum. That a type of case frequently presents issues of law counsels in favor of a collegial forum. The impact of a legal conclusion, almost by definition, tends to be more widespread than that of a finding of fact. Thus, all else being equal, there is a stronger argument for investing greater monetary resources to achieve a higher quality decision. Collegiality contributes to that quality in several ways. It provides a means for the interchange and testing of views. It diffuses the effects of the personal values and subjective biases that inevitably influence judgment calls on close legal questions. And it reduces the chance of simple inadvertence.[166] All these elements are especially vital when the question is one of law.

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[165] See, e.g., Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L. Rev. 1 (1985), and discussions cited therein.

[166] Currie & Goodman, note 1 supra, at 12; cf. Robinson, note 139 supra, at 965 (discussing policy questions). The Administrative Conference has cited the prevalence of legal questions as a factor favoring direct court of appeals review. A.C.U.S. Rec. 75-3, 1 C.F.R. § 305.75-3(g, recs. 1(a),2,6(b)(i)) (1985).

Thus, when legal issues are frequent, the importance of collegiality and the greater tolerance for increased costs both militate toward administrative review in the B.I.A. and judicial review in the courts of appeals. That result is reinforced by the interest in promoting uniform interpretations of law -- a function that, as discussed earlier, is best entrusted to the B.I.A. and to the courts of appeals.

The B.I.A. has two other features that makes it vastly superior to the A.A.U. when the issues are legal: Its members are themselves attorneys, and they are assisted by a large staff of attorneys. The B.I.A. is thus better able to research the law, to analyze the legal issues once the pertinent authorities have been located, and to draft precedential opinions.

The courts of appeals enjoy additional advantages over the district courts in resolving questions of law. Those are the kinds of questions that occupy almost all their time. They are more experienced in opinion-drafting. And, because courts of appeals are fewer in number, they would be more intensivly exposed to, and therefore would acquire greater familiarity with, any specialized subject matter they are assigned. That expertise takes on increased importance when the subject matter is such that resolution of one question requires a strong conceptual understanding of highly specialized, related, problems.[167]

Questions of descriptive fact do not call for the same resources. They present two tasks: the taking of evidence and the reaching of conclusions. The former is discussed separately below. When the latter function is performed by a reviewing body, the decision is made on the basis of a preexisting administrative record, at least in the present context. In the case of both the B.I.A.[168] and the A.A.U.,[169] the reviewer substitutes its judgment for that of the initial factfinder. Judicial review, in contrast, is generally confined to a determination whether the finding is supported by substantial evidence.[170] Under either standard of review, however, the tribunal must perform an often laborious search of the administrative record -- ordinarily a wasteful use of the time of a multi-member panel.

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[167] Cf. Currie & Goodman, note 1 supra, at 15 (collegiality useful in resolving difficult technical issues).

[168] See note 79 supra.

[169] Interview with Weinig, note 84 supra.

[170] I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4). An exception is made for certain cases in which citizenship is disputed. Id. § 106(a)(5), 8 U.S.C. § 1105a(a)(5).

Further, subject to the comments below, findings of fact do not have the precedential effect that might justify the more elaborate mechanisms recommended for questions of law. That is not to minimize the consequences for the individual litigants; it therefore bears emphasis that the law/fact/discretion distinction, like each of the other items considered in this section, is only one of several factors to be weighed and balanced.

Because fact questions do not normally require the combined efforts of a multi-member tribunal, and because they do not have the future impact that legal interpretations generate, case categories laden with issues of fact can be suitable candidates for the A.A.U. and for the district courts. As to the latter, an additional consideration is that district judges are more experienced factfinders than are circuit judges. While both often pass on the sufficiency of the evidence, district judges also make their own findings of fact in bench trials and make evidentiary rulings even in jury trials.

A final category of administrative decision is the exercise of discretion. Although that term can mean different things to different people, I use it here to include the application of broadly worded statutory provisions to individual fact situations. Congress has entrusted primary enforcement of the immigration laws to the Attorney General,[171] but in appellate matters the Attorney General has delegated his discretionary authority to the B.I.A. explicitly[172] and to the Associate Commissioner implicitly.[173] Thus, at the administrative level, there is no real danger that the exercise of discretion by either the B.I.A. or the A.A.U. would usurp a power entrusted elsewhere. Rather, the question is to which tribunal it would be wiser to allocate cases frequently requiring the exercise of discretion.

A simple act of administrative discretion can require the formulation of policy if the impact of the decision will be sufficiently widespread. That will be true when the fact situation is a common one, or when a decision is likely to have a sweeping _a fortiori_ effect. When the B.I.A. concludes that a given set of primary facts does not constitute "extreme hardship,"[174] for example, the effect is to suggest the same conclusion in subsequent cases that present hardships even less severe.

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[171] _Id._ § 103(a), 8 U.S.C. § 1103(a).

[172] 8 C.F.R. § 3.1(d) (1985).

[173] The regulations give the Associate Commissioner "appellate jurisdiction" over designated cases, 8 C.F.R. § 103.1(f)(2)(1985), a delegation the Administrative Appeals Unit has implicitly interpreted to authorize de novo review. _Interview with Weinig_, note 84 _supra_.

Since the exercise of discretion can require major policy formulation, there is often reason, at the administrative level, to assign to policymaking officials those cases that frequently present discretionary questions. Those officials will possess a broader perspective because their work is not confined to adjudication.[174A] Moreover, because of their powers to formulate policy through other means, their decisions can achieve a measure of coherence not attainable by those who must wait for the proper case.[175]

But in choosing between the B.I.A. and the A.A.U., as discussed previously, resort to the policymaker/adjudicator distinction is illusory. Decisions of both bodies are subject in theory to approval by their policymaking superiors; in practice, review of either body's decisions would be rare.

Rather, in cases likely to require the exercise of discretion, both the choice between the A.A.U. and the B.I.A. and the choice between the district courts and the courts of appeals rest on attributes other than degree of policymaking responsibility. Some of the reasons considered earlier for preferring collegial bodies on issues of law apply also to issues of discretion. Since discretion requires a judgment that can rest on personal values and attitudes, collegiality disperses the biases and permits the exchange and testing of ideas. If the discretionary issues that the cases are likely to raise are ones that will have a widespread impact, then these advantages are intensified, again for reasons analogous to those offered in the discussion on questions of law.

(3) Volume.

A huge caseload can impair both the error-correcting and the guidance functions of appellate review.[176] If the tribunal operates collegially, high volume can be especially devastating. If it is not to result in less time per case, high volume can require expanding the size of the tribunal. At some point a tribunal becomes too large to function effectively as a collegial body.[177] High volume, therefore, favors district court review.[178]

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[174] I. & N. Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (suspension of deportation). By analogy, when reviewing courts hold that the B.I.A. did not abuse its discretion in finding no extreme hardship, see, e.g., I.N.S. v. Rios-Pineda, 105 S.Ct. 2098 (1985); I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981), they dictate similar conclusions in later cases raising hardships less severe.

[174A] Courts in other contexts have declined to defer to those administrative tribunals whose responsibilities are solely adjudicative. E.g., Potomac Elec. Power Co. v. Director, 449 U.S. 268, 278 n.18 (1980); Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61, 66 (1st Cir. 1985); Hastings v. Earth Satellite Corp., 628 F.2d 85, 94 (D.C. Cir. 1980).

[175] See generally the sources cited in note 162 supra.

For the same reasons, a large caseload favors non-collegial review at the administrative level.[179] In the present context, that factor militates toward A.A.U. review for high-volume case categories. Still, if it were otherwise found desirable to expand the jurisdiction of the B.I.A., an alternative to increasing the membership would be adoption of a panel system. That possibility is explored below.[180]

(4) Rate of appeals.

Much of what has already been said about the comparative benefits of district courts and courts of appeals hinges on a question that can be extremely difficult to answer in practice: What proportion of district court decisions would be appealed to the courts of appeals if a system of two-tier judicial review were adopted for a particular group of cases? As noted above, one major advantage of district court review is that it saves the time of the circuit judges. The lower the appeal rate, the greater will be the savings.[181] Of course, the time of the appellate judges, while a critical resource, is not the only consideration. Crowded trial court dockets make it impossible to ignore the time of the district judges.

As for total judge-time, the break-even point is not capable of exact ascertainment. A three-judge appellate panel does not need three times as many hours to decide a case as does a single district judge, since the opinion-drafting can generally be consigned to one judge. But Currie and Goodman estimate that, on the average, a district judge can probably decide in two hours a case that would have taken at least three total hours of circuit judges' time.[182] Under that assumption, they conclude that the break-even point with respect to total judge-time occurs when approximately 30% of the district court decisions are appealed.[183]

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[176] Carrington, Meador & Rosenberg, note 128 supra, at 4-7.

[177] Currie & Goodman, note 1 supra, at 10.

[178] Accord, A.C.U.S. Rec. 75-3, 1 C.F.R. § 305.75-3, Rec. Nos. 1,2,6(b)(iii) (1985); Accord, Currie & Goodman, note 1 supra, at 10; see also Currie, Judicial Review under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1233-34 (1977), based on A.C.U.S. Report 76-4, 4 Reports & Recs. of A.C.U.S. 555 (1977).

[179] Accord, A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3, Rec. Nos. 3(a)(i), 3(b)(i).

[180] See notes 428-35 and accompanying text; see also A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3, Rec. No. 3(c)(i) (1985).

[181] A.C.U.S. Rec. 75-3, 1 C.F.R. § 305.75-3, Recs. Nos. 1, 6(b)(iii) (1985); see Currie & Goodman, note 1 supra, at 18-19.

A factor that estimate does not reflect, however, is that appealed cases are a select group. One consideration in deciding whether to file an appeal is the chance of success. Appealed cases can therefore be assumed generally to include a disproportionate share of the closer, more difficult, and therefore more time-consuming, cases. Consequently, when a system of direct court of appeals review is instituted, the extra cases the courts of appeals will have to absorb (i.e., the cases that the district courts would have weeded out had two-tier review been adopted) will tend to be disproportionately easy.

Those are some of the difficulties in estimating how high the appeal rate must be before direct court of appeals review becomes worthwhile. Further difficulties lie in predicting what the appeal rate would actually be, in a given category of cases, were two-tier review adopted. If the current review system is two-tier, statistics on the actual appeal rate might be segregable. But if the administrative decision is one newly created, or if it is currently non-reviewable, or if it is currently reviewable directly in the courts of appeals, the estimate will be more speculative. A starting point might be the overall rate of appeals from the district courts, or the appeal rate for administrative cases only, or the rate for certain closely analogous administrative cases originating in the district courts. Predictions should reflect the financial means of the aggrieved parties, the interests at stake, and any special incentive the parties might have to delay the effect of the administrative order. If the decisions are ones that at some former time were reviewed in district court, that historical experience might be relevant, even though dated.

(5) Need for Taking of Evidence.

As a general proposition, it is inefficient for multi-member tribunals to conduct evidentiary hearings.[184] Thus, if deficiencies in the administrative record will require the reviewing body to take additional evidence, a strong case can be made for placing review in the district courts.[185] The same reasoning would dictate that administrative review be performed by the A.A.U. rather than the B.I.A. in classes of cases where frequent additional factfinding by the reviewer is anticipated.

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[182] Id. at 9 & n.38; id. at 18-19 & 18 n.58. Less important factors augmenting this disparity are the consultation time and the time spent drafting concurring and dissenting opinions. Id. at 9 n.38.

[183] Id. at 18.

[184] Id. at 11.

Fortunately, however, it is rare for a reviewing court -- whether it is a district court or a court of appeals -- to take additional evidence. Judicial review of administrative action is normally confined to the administrative record.[186] If the record is inadequate to permit review, the usual recourse is to remand to the agency for clarification or for further findings.[187] A court of appeals can do that as easily as a district court.

In the present context, analogous observations can be made about administrative review. Although the B.I.A. and the A.A.U. both make independent findings of fact,[188] they do not take additional evidence; their findings are based on a preexisting record.[189]

Nonetheless, it will sometimes be necessary for a reviewing tribunal to take evidence. The parties might disagree over whether particular evidence was considered below; over what the reason for the agency's decision actually was; over whether the decisionmaking official had a personal bias; over whether particular events had occurred after the record had been compiled; or over whether the government had behaved illegally or should for other reasons be estopped. In any of those cases, the record might (or will) be an inadequate basis for resolving the

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185. Id. Accord, A.C.U.S. Rec. 75-3, 1 C.F.R. § 305.75-3, Recs. Nos. 1, 6(a), 6(b)(ii) (1985); Carrington, Meador & Rosenberg, note 128 supra at 191; 4 Davis, note 131 supra, at 131 (but noting that statutory language often suggests otherwise).

186. Florida Power and Light Co. v. Lorion, 105 S.Ct. 1598, 1607 (1985); see also Gordon & Rosenfield, note 8 supra, § 8.11b; I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4).

187. Florida Power and Light Co. v. Lorion, 105 S.Ct. 1598, 1607 (1985); Fuentes v. I.N.S., 765 F.2d 886 (9th Cir. 1985); accord, Currie & Goodman, note 1 supra, at 11 (though remand can create problems); 4 Davis, note 131 supra, at 136; Gordon & Rosenfield, note 8 supra, § 8.11b; Johnson & Stoll, Judicial Review of Federal Employee Dismissals and Other Adverse Actions, 57 Cornell L. Rev. 178, 188 (1972).

188. See notes 79, 84 supra and accompanying text.

189. Interview with Holmes & Hurwitz, note 76 supra; Interview with Weinig, note 84 supra.

dispute.[189.5] And in any of those cases, a remand to the agency might be either inefficient or inappropriate.[190]

Further, although it would be inefficient for courts of appeals to conduct evidentiary hearings regularly, they are capable of doing so when the need arises.[191] There is also the alternative of establishing direct review in the courts of appeals but authorizing transfers of cases to the district courts when judicial factfinding is necessary.[192]

One commonly invoked criterion for choosing a judicial forum is the degree of formality of the administrative proceeding.[193] The theory is that a formal hearing increases the likelihood of a fully developed record that will obviate the need for judicial factfinding. There is validity to that view, since the resolution of certain kinds of disputes without a remand is likely to be aided by a formal record. A hearing transcript, for example, might reveal whether particular evidence was considered or whether the hearing officer was biased. If the decision was oral, the transcript might clarify the reasons for it. Even if the decision was in writing, the formality might induce the hearing officer to provide an analysis more detailed than would have been supplied in a less formal proceeding. Along the same lines, the formality of the administrative review process can influence the wisdom of choosing a particular judicial review forum in ways examined below.[194]

Yet the relevance of the formality level is easily overplayed. First, the question for the reviewing court might be purely legal, in which event no taking of evidence will be necessary.[195] Second, even when it is a finding of fact that is being reviewed, an informal proceeding can yield documentary evidence adequate to permit review. As Professor Davis has

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[189.5] See generally McMillan & Peterson, The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action, 1982 Duke L.J. 333.

[190] Currie & Goodman, note 1 supra, at 11.

[191] Id. at 11 n.44, 58. See, e.g., Nat'l Nutritional Foods Assn. v. F.D.A., 491 F.2d 1141, 1144 (2d Cir. 1974).

[192] A.C.U.S. Rec. 75-3, 1 C.F.R. § 305.75-3, Rec. 7 (1985); see Currie, note 178 supra, at 1252-53; 4 Davis, note 131 supra, at 136; Johnson & Stoll, note 187 supra, at 194.

[193] A.C.U.S. Rec. No. 75-3, 1 C.F.R. § 305.75-3, Recs. Nos. 1, 6(a)(1985); Currie, note 178 supra, at 1232; Currie & Goodman, note 1 supra, at 5-6; Strauss, note 160 supra, at 266.

[194] See notes 208-13 infra and accompanying text.

[195] See Abedi-Tajrishi v. I.N.S., 752 F.2d 441, 443 (9th Cir. 1985), and cases cited therein; see also K. Davis, Administrative Law of the Seventies 535-38 (1976); 4 Davis, note 131 supra, at 138.

observed in another context, the real question is whether the record is full, not whether the hearing was quasi-judicial[196] -- a suggestion taken up recently by the Supreme Court.[197] Third, even if there has been a formal proceeding, the reviewing court might be unable to avoid taking further evidence -- for example, when the aggrieved party alleges illegal government acts committed outside the proceedings, or when temporary relief is sought on the basis of events occurring after the close of proceedings. That a collegial body can review informal agency action quite effectively, without the need to take additional evidence, is borne out by the B.I.A., which reviews the informal decisions of district directors. One might even argue that the absence of a formal evidentiary hearing makes review by a collegial body even more pressing.[198]

To summarize, a class of cases generally should not be assigned to a collegial reviewing tribunal when it is expected that the reviewer will frequently have to take additional evidence. But the need for the reviewer to take evidence is rare, at least in the present context. And the formality of the original administrative hearing, while slightly increasing the probability that the resulting record will be adequate, should not be a weighty consideration.

(6) Similarity of issues to those in other cases.

Once a given class of cases is committed to a given administrative or judicial forum, there is benefit in assigning to that same forum other classes of cases tending to raise similar issues. The knowledge and insights that the tribunal acquires in grappling with the issues in one set of cases can assist it in reaching informed and thoughtful decisions in the other set of cases. In addition, having the same tribunals resolve the same issues serves the interest of judicial efficiency by avoiding the need to reinvent the wheel. Finally, this process facilitates the uniform, coherent, development of the case law.

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[196] Davis, note 195 supra, at 536, quoting from Deutsche Lufthansa Aktiengesellschaft v. C.A.B., 479 F.2d 912, 916 (D.C. Cir. 1973).

[197] Florida Power & Light Co. v. Lorion, 105 S.Ct. 1598 (1985).

[198] The argument would be that a lack of procedural care at one stage of the process magnifies the need for care at other stages. A counterargument would be that the lack of a formal evidentiary hearing reflects Congress's view that the interests at stake are trivial. The same congressional philosophy would militate against collegial review.

(7) Avoidance of bifurcation.

The problem of "bifurcation" potentially arises whenever one tribunal has exclusive jurisdiction over one group of cases and another tribunal has exclusive jurisdiction over a somehow related group of cases. The "problem" is really two problems, and in principle they can arise in the context of either administrative or judicial forum selection.

The first problem is the wasteful jurisdictional litigation that arises when the bar is uncertain which tribunal has jurisdiction over which cases.[199] One response would be to send all cases in the same general subject area, or all decisions made under the same comprehensive statute, to the same reviewing body.[200] That course would eliminate or at least reduce the jurisdictional confusion, and would trigger the side benefits associated with issue similarity, discussed above. There is much to be said for such a bright-line test, but the price, absent fortuity, is to forego the many advantages that would have accrued had the attributes of the review forum been more carefully tailored to the attributes of the case.

Moreover, thoughtful drafting of the statutes and administrative regulations can minimize the need for jurisdictional litigation. Limits to the human imagination and to the English language concededly prevent the complete eradication of this problem, but lessons about what to anticipate can be gleaned from prior experience. Further, even when an ambiguity does surface, court decisions can keep the jurisdictional confusion short-lived. This last consideration is of special relevance when the question is whether an existing scheme that allocates related orders to two different tribunals should be altered to place both orders in the same body. If the reason for the contemplated change is to clarify the law, one factor to consider is how many of the initial interpretation issues have already been resolved.

A second, distinct, problem is the possible bifurcation of a single case. That result is possible when different tribunals have jurisdiction over different administrative orders affecting the same individual. Courts have often interpreted jurisdictional statutes to require bifurcation.[201]

What is wrong with splitting a case? Sometimes, nothing. Depending on the relationship betwen the two orders, however, bifurcation can undermine judicial efficiency. The validity of both orders might, for example, turn on a common question of either law or fact. Resolution of the same underlying issue by both bodies then creates the potential for both duplication of effort and inconsistent results. Further, resolution of one claim might either moot the other claim entirely or affect the way the other should be resolved on the merits. In either of those instances, routing the two cases to the same tribunal would be beneficial.

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[199] See K. Davis, 1970 Supplement to 1st ed. of Administrative Law Treatise (1958), at 798-99.

[200] Id.

[201] 4 Davis, note 131 supra, at 142.

Apart from the problem of extra judicial work, bifurcation can delay the ultimate results. Either the individual or the government might have to wait for both decisions to learn what the final consequences will be. If so, the individual might be unable to make important planning decisions and the government will be unable to close out the case.

The Supreme Court has recently favored statutory constructions that would avoid the need to splinter the core issue from ancillary issues.[202] The above discussion suggests that the drafting of statutes and regulations should reflect an analogous philosophy. Frequently recurring ancillary orders should be anticipated; the likelihood and consequences of bifurcation should be assessed along with the other factors relevant to the selection of a review forum; and the forum decision should be made explicit so that jurisdictional litigation can be minimized. Alternatively, depending on the likely effects in the particular setting, the statute or regulations could call for bifurcation but give either one or both of the two tribunals the discretionary power to assert pendent jurisdiction.[203]

(8) Incentive to delay.

In some contexts, delay operates to the advantage of the individual challenging government action. One who is presently receiving a benefit generally has an interest in prolonging a government decision whether to terminate that benefit, even though that interest can be partly offset by a longing for the certainty that the final decision will bring. One aim in choosing a review forum, therefore, is to minimize the total time consumed by the review process. Speed is crucial because, the longer the processing time, the greater becomes the incentive to file a frivolous appeal. And the more appeals that are filed, the more rapidly the processing time will increase. This cycle is best broken at the start.

In theory, therefore, one factor in choosing a review forum should be the speed with which cases will be decided. But that factor can be extremely difficult to apply. At the judicial level, the times from filing to disposition vary from one circuit to another and from one district to another.[204] For immigration cases, hard data on the average processing times for the two major administrative reviewers are not available. The A.A.U. estimates a mean time of about one to two months;[205] the B.I.A. disposition times fluctuate widely from one case to another, but a rough estimated mean might be three months.[206] Building a permanent review structure around those data would be problematic even if the estimates were solid, since processing times can change with variations in both case volume and staffing.

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[202] Florida Power and Light Co. v. Lorion, 105 S.Ct. 1598, 1606 (1985).

[203] See notes 424-26 infra and accompanying text.

Eliminating steps can potentially decrease the processing time. At the judicial level, bypassing the district courts and placing review directly in the courts of appeals save the time needed for district court processing. But the efficacy of that strategy depends on the rate at which district court decisions would otherwise be appealed, and on the comparative speeds of district courts and courts of appeals. If the appeal rate would have been low, and if district court review time turns out to be appreciably less than court of appeals review time, the net effect of bypassing the district courts could actually be to increase the aggregate delay.

Keeping down the review time depresses the incentive to file a frivolous appeal to achieve delay. As long as some incentive remains, however, it is also important to minimize the capacity to manipulate the review system. Subject to the preceding qualifications, eliminating district court review may serve that purpose as well. Other means, however, should also be explored. Speeding the overall process is of course the most effective remedy, but that is not always possible without increased staffing or adoption of other measures that impose costs the system is unwilling to absorb.

Still, existing vehicles are available. Summary procedures can be utilized when either an administrative or a judicial tribunal finds a case to be frivolous. In appropriate cases, sanctions can be imposed on attorneys who file frivolous appeals,[207] so long as the lack of merit is sufficiently clear that there will be no real danger of chilling vigorous advocacy in future cases.

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[204] That has certainly been true in immigration cases. Interview with Robert L. Bombaugh, Director, Office of Immigration Litigation (D.O.J.), June 13, 1985.

[205] Interview with Weinig, note 84 supra.

[206] David Holmes, the Chief Attorney Examiner of the B.I.A., produced that estimate by dividing the current backlog by the average number of monthly decisions. Interview with Holmes & Hurwitz, note 76 supra.

[207] Immigration cases in which that has been done include Dallo v. I.N.S., 765 F.2d 581 (6th Cir. 1985); Muigai v. U.S.I.N.S., 682 F.2d 334 (2d Cir. 1982); Der-Rong Chour v. I.N.S., 578 F.2d 464, 468-69 (2d Cir. 1978).

A final cautionary note is that the manipulation problem must be kept in perspective. Statements urging that procedures be "streamlined" are easy to make and difficult to resist. The abuses attributable to the particular procedural step that it is proposed to delete might be small in scale. Or the elimination of that step might remove important protections for the individual or indirectly add to the work or the delay times at other stages.

(9) Relationship between administrative forum and judicial forum

There are many connection points between administrative review and judicial review. Though their functions are not identical, they are complementary in several respects examined below.[208] Administrative review will sometimes eliminate a party's need to resort to more costly judicial review. It has been argued that, the more expansive the administrative review, the less intrusive the judicial review is likely to be.[209] If frequent judicial review is anticipated, administrative review should be of a type likely to culminate in a well-written opinion that will facilitate judicial review by clarifying the reasons for the decision and by conveying any specialized knowledge that will aid a generalist court in discharging its review function. And, as discussed below,[210] the question of whether the agency head should be empowered to review the decisions of an administrative review board is intimately tied to the question of whether the agency should be authorized to challenge the review board decision in court.

The thrust of this subsection, however, is that there are at least two respects in which the choice of administrative review forum, once made, should itself be a factor influencing the choice of judicial review forum, and vice versa.[211] First, since one of the functions of the district court in a two-tier system is to sort out the issues,[212] the case for direct court of appeals review is strongest when the administrative reviewer has already sharpened the issues by drafting a carefully reasoned opinion. As discussed earlier, the B.I.A. is better equipped than the A.A.U. to fill that role. Thus, a decision to place administrative review in the B.I.A. is a reason to place judicial review in the courts of appeals. Conversely, if it is decided for independent reasons that judicial review should be in the courts of appeals, that decision is a reason to send the case to the B.I.A. for administrative review.

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[208] See the discussion on combining the strengths of generalists and specialists, text following note 512 infra.

[209] Verkuil, note 9 supra, at 1180.

[210] See notes 470-78 infra and accompanying text.

[211] In addition, as this entire list of case attributes illustrates, both forum choices can depend on common factors.

[212] Currie & Goodman, note 1 supra, at 6.

Second, some find it undignified for a single individual to set aside the collective decision of a specialized, multimember, tribunal.[213] That premise, if accepted, also favors judicial review in the courts of appeals when administrative review has been entrusted to the B.I.A.

(10) Status quo.

Any change will entail a certain amount of disruption. Statutes, regulations, and job descriptions might have to be altered. Personnel moves might have to be made. Those who will be taking on new functions might require training. These costs are short-term, but they must nonetheless be weighed against the benefits that the change is expected to bring.

(11) Constitutional limitations.

For some administrative decisions, the choice of review forum can be constrained either directly or indirectly by the Constitution. For example, if review by a specialized court is contemplated, article III may limit the range of options as to type of tribunal.[214]

Even when the choice is between district courts and courts of appeals, constitutional limitations can be pertinent. If personal liberty is implicated, particularly by possible administrative detention, the constitutional bar on suspension of habeas corpus[215] must be considered. If, in the particular context, the availability of habeas corpus is constitutionally required, then the options for judicial forum are limited. It would be possible to channel habeas corpus applications to the courts of appeals,[216] but the collective decisionmaking process would hinder the promptness that is vital when unlawful government restraint is alleged. One solution might be to provide that any habeas application filed in the court of appeals must be adjudicated by a single circuit judge.[217] Given the magnitude of the individual interest, however, it would seem important to provide for appeal of that judge's decision to a regular court of appeals panel. And if that is done, little is gained over traditional two-tier review originating in the district court.[218]

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[213] Id. at 14.

[214] See section IV infra.

[215] U.S. Const. art. I, § 9, cl. 2.

[216] The general federal habeas statute authorizes circuit judges to grant writs of habeas corpus, 28 U.S.C. § 2241(a), though the applicant must explain why relief was not sought in the district court, id. § 2242.

Thus, in classes of cases where the Constitution will frequently mandate the preservation of habeas, the most viable option might be two-tier judicial review. An alternative might be exclusive jurisdiction in the courts of appeals, with a proviso allowing habeas applications in the district courts whenever habeas is constitutionally required, or when liberty is constricted in some lesser manner.[219] These considerations are of particular relevance in immigration cases, as discussed below.[220]

A final constitutional concern is procedural due process. If the interests are great enough that fundamental fairness requires a de novo judicial trial,[221] the district court will be the obvious forum.

The preceding discussion lists some eleven factors that should influence the choice of forum for the review of administrative action. I wish to emphasize that I am not suggesting the application of these factors on a case-by-case basis. Many are quite general. Several, whether general or specific, will often conflict. And most, when applied to individual cases, will be heavily affected by personal values.[222] For all these reasons, a case-by-case approach would concededly produce interminable jurisdictional uncertainty. Rather, the proposal is for a categorical approach, in which whole classes of cases are examined for tendencies to possess the attributes discussed here. That judgment is no less subjective, but, once it is made, the results can be embodied in statutes or regulations that supply a reasonable measure of certainty.

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[217] See note 216 supra.

[218] The only apparent gain is that the superior prestige of appellate judgeships might attract individuals whose higher caliber would improve both the actual and the perceived quality of the decision. See notes 139-41 supra and accompanying text. There would be a loss if one accepts the premise that the time of a circuit judge is more valuable than the time of a district judge because the former is ordinarily part of a collegial decisionmaking process. See Currie & Goodman, note 1 supra, at 18.

[219] See, e.g., I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) ("custody" test). Issues are whether habeas should be authorized even when not constitutionally required and what the Constitution does require. See notes 260-67 infra and accompanying text.

[220] See notes 260-67 infra and accompanying text.

[221] See Ng Fung Ho v. White, 259 U.S. 276 (1922) (citizenship claimed as defense to deportation); I. & N. Act § 106(a)(5), 8 U.S.C. § 1105a(a)(5) (court of appeals must transfer case to district court if alien in deportation proceedings makes nonfrivolous claim of U.S. nationality and genuine issue of material fact is presented).

III

Choosing a Review Forum: Immigration Cases

The framework developed in the preceding section can now be applied to various classes of immigration decisions.

A. Deportation

As discussed earlier, a deportation order is entered by an immigration judge after an evidentiary hearing. The order is appealable to the B.I.A. Judicial review is by petition for review in the court of appeals, except that an alien held in custody may obtain review by applying for a writ of habeas corpus in the district court.

Judicial review of deportation orders has an interesting history,[223] but only one development requires mention here. Before 1961, deportation orders could be reviewed only in the district courts.[224] The 1961 amendments assigning deportation cases to the courts of appeals were prompted almost entirely by Congress's belief that aliens were manipulating judicial review to delay execution of deportation orders.[225] The thinking was that bypassing the district court would eliminate one element of delay and thus diminish the incentive to bring frivolous actions.

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[222] The role of personal values in shaping procedural choices, and the devices by which value conflicts are resolved, are discussed carefully in Resnik, *Tiers*, 57 So. Cal. L. Rev. 837 (1984).

[223] For descriptions of that history, *see*, *e.g.*, *Aleinikoff & Martin*, note 8 *supra*, at 562-69; *Goodman*, note 106 *supra*, at 1-3; Gordon & *Rosenfield*, note 8 *supra*, § 8.2.

[224] Some of the very early cases interpreted the immigration statutes as barring all judicial review. *See*, *e.g.*, Chin Ying v. United States, 186 U.S. 202 (1902); Chin Bak Kan v. United States, 186 U.S. 193 (1901); Li Sing v. United States, 180 U.S. 486 (1901). Eventually, however, the courts began to assume that aliens taken into custody could challenge the lawfulness of the deportation order by applying for habeas corpus. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387-96 (1953). But even habeas had its limitations. It was then generally assumed that the habeas application would lie only after the alien had been taken into custody -- an event that ordinarily did not occur until a

Whether direct review in the courts of appeals has actually inhibited delay seems doubtful. A two-tier system in which district court review is by habeas corpus would not add significant delay, since habeas applications are adjudicated promptly.[226] The real problem in 1961, at least as Congress perceived it, was not the two-tier system but the practice of repeated actions, in whatever forum, challenging the same depor-

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224. (continued) deportation order had been issued and the I.N.S. had prepared to execute it. Thus, aliens sought injunctive or declaratory relief to obtain review of deportation orders in advance of detention. In Heikkila v. Barber, 345 U.S. 229 (1953), however, the Supreme Court interpreted the pre-1952 immigration statute, which made the immigration officers' decisions "final," as precluding judicial review other than by habeas corpus. When the Court later had occasion to interpret an analogous provision in the 1952 Act, see I. & N. Act § 242(b), 8 U.S.C. § 1252(b), it reversed direction. Because the 1952 Act had been passed after the Administrative Procedure Act, Pub. L. 404, ch. 324, 60 Stat. 237, 79th Cong., 2d Sess. (1946), the 1952 Act would not be held to preclude judicial review in the absence of clear statutory language to that effect. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955). Declaratory and injunctive relief thus became available once again as a means to challenge deportation orders. The 1961 amendments discussed in the text ended that practice by making petitions for review in the courts of appeals the sole means for reviewing deportation orders, except for habeas corpus once the alien was in "custody." See I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9).

[225] See Report of the Committee on the Judiciary of the House of Representatives on H.R. 187, Rpt. No. 565, 87th Cong., 1st Sess. (June 22, 1961), rep'd in O. Trelles & J. Bailey (eds.), Immigration and Nationality Acts Legislative History and Related Documents, Doc. No. 52 (1979). Toward the same end, Congress imposed a six-month time limit for filing a petition for review, I. & N. Act § 106(a)(1), 8 U.S.C. § 1105(a)(1), and prohibited all judicial review, whether by petition for review or by habeas, once the case has already been litigated. Id. § 106(c), 8 U.S.C. § 1105a(c).

[226] See Gordon & Rosenfield, note 8 supra, at 8-13; cf. 28 U.S.C. § 2243.

tation order.[227] Congress addressed that particular problem by codifying res judicata.[228] Further, much if not most of the delay occurs at the administrative level, a problem that the petition for review does not solve.[229] And the petition for review carries with it an automatic stay of deportation,[230] as it must if judicial review is to have any value.

Direct court of appeals review can even prolong the litigation process. Absent a high appeal rate from district court decisions,[231] direct review lengthens the total review time unless the courts of appeals can decide petitions for review more expeditiously than district courts can decide habeas applications -- a doubtful prospect. Finally, direct review of deportation orders in the courts of appeals can require the bifurcation of cases when certain orders collateral to the deportation decision are also challenged, a problem discussed below. When that occurs, additional delay is possible.

Even if petitions for review did indeed tend to shorten the review period and thus lessen the incentive to file frivolous claims, there are alternative means of accomplishing those aims. Summary procedures can be employed in frivolous cases.[232] The Justice Department can ask the court to invoke the existing statutory mechanism for dissolving the automatic stay that accompanies service of the petition for review.[233] And sanctions could be levied more frequently on attorneys who abuse the court system by bringing frivolous actions.[234]

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[227] Report on H.R. 187, note 225 supra, at 3, 5-11, 20-26; see also Note, N.Y.U. L. Rev., note 106 supra, at 1155-56 (1967).

[228] I. & N. Act § 106(c), 8 U.S.C. § 1105a(c).

[229] Juceam & Jacobs, Constitutional and Policy Considerations of an Article I Immigration Court, 18 San Diego L. Rev. 29, 33 (1980).

[230] I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3).

[231] See notes 252-55 infra and accompanying text.

[232] This point has been made by others. See Currie & Goodman, note 1 supra, at 34 & n.123; Gordon & Rosenfield, note 8 supra, at 8-89. There is, however, an important practical problem. If the I.N.S. moves for summary affirmance, the alien must be given the opportunity to respond to the motion. If the motion is ultimately denied, the net effect will be to set back the briefing schedule and thus to increase the delay. Interview with Bombaugh, note 204 supra.

[233] I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3). Motions to dissolve the statutory stay are often granted. See examples cited by Gordon & Rosenfield, note 8 supra, at 8-89 n.84. This strategy, however, is subject to constraints analogous to those described in note 232 supra.

[234] See Gordon & Rosenfield, note 8 supra, at 8-89.

Finally, before forum decisions are measured by their effectiveness in reducing delay, it is important that the whole problem be placed in perspective. No one has attempted to estimate how many requests for judicial review are actually motivated solely by a desire to delay deportation. Critics of the 1961 amendments believed there were very few then,[235] and it seems likely that, in terms of absolute numbers, frivolous petitions for review are not a serious national problem today. In fiscal year 1984, a total of 418 petitions for review were filed nationwide.[236] Even if a hefty fraction of those petitions were frivolous -- and there is no evidence to indicate that that is the case -- the extra months bought by so small an absolute number of aliens seem trivial in the face of several million undocumented aliens present indefinitely. The executive and judicial resources taken up by frivolous petitions for review are, of course, a separate concern. Again, however, neither the number of cases nor the small amount of executive and judicial time that a truly frivolous claim consumes makes the problem a serious one.

Should deportation orders, then, be returned to the district courts? At least one leading jurist believes they should.[237] Certainly the foregoing discussion suggests that the initial rationale of reducing delay is not a persuasive reason for keeping deportation orders in the courts of appeals. But the case for direct review need not rest on so thin a reed, for the other factors influencing choice of forum do tend generally to favor court of appeals review. As discussed below, these same factors also suggest that administrative review should continue to be in the B.I.A.

One factor militating toward review by the B.I.A. and by the courts of appeals is the impact of the decision on both the individual and the public. Like other immigration-related decisions, deportation can vary dramatically in its impact. Permanent residents will most likely have developed stronger ties to the community than will temporary visitors. Aliens who have close relatives in the United States may have greater interests in defending against deportation than those who do not. Aliens here lawfully may have more at stake than do aliens who entered surreptitiously or who have overstayed their temporary visas. Aliens who claim that they will be persecuted if returned to their native countries may have more to lose from a deportation order than do other aliens. And American citizens who are erroneously deported lose more than do aliens who assert other defenses. Many writers have considered both the relevance and the magnitude of these interests.[238]

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[235] Report on H.R. 187, note 225 supra, at 28-32 (minority report).

[236] Interview with Bombaugh, note 204 supra.

[237] Friendly, note 131 supra, at 175-76. Apart from his concerns as to timing, Judge Friendly also cited the need for jurisdictional litigation. Id. at 176.

Those and other variations in individual circumstances make it dangerous to generalize about the impact of deportation. But two observations can be made. The stakes for the individual can at least be said to be frequently great. Even the undocumented alien who claims only facts that if proved would qualify him or her for discretionary relief might well have a great deal riding on the outcome. Second, all deportations share a common element traditionally viewed as relevant to the desirable degree of procedural protection: disturbance of the status quo, as distinguished from the receipt of an initial benefit.[239] Both factors elevate the need for procedural safeguards and thus bolster the case for accepting greater monetary costs to the public.

The types of issues raised by deportation are also well suited to resolution by the B.I.A. and the courts of appeals. Even a casual perusal of the Federal Reporter reveals numerous published deportation decisions resolving questions of law and reviewing the exercise of discretion. The same is true of the published B.I.A. reports, which are stocked with deportation cases that the B.I.A. regards as precedential. And several recent Supreme Court decisions have reviewed the exercise of B.I.A. discretion[240] or interpreted the statutory prerequisites to the granting of discretionary relief.[241] As discussed earlier, both resolution of legal questions and review of the exercise of discretion benefit from collegial decisionmaking and from the uniformity of interpretation that the B.I.A. and the courts of appeals are better equipped to foster. In addition, the legal training of the B.I.A. members and staff provides strong advantages in resolving issues of law. Moreover, deportation issues are capable of stirring fierce emotions that can increase the contribution of personal values. When that is true, a collegial process helps to diffuse the biases. Above all, the statutory interpretation problems presented by deportation cases often require understanding of complex relationships among several provisions.[242] That feature enhances the benefits of expertise and thus favors courts of appeals because, as discussed earlier, they are fewer in number and thus receive a more concentrated exposure to whatever subject matter they are assigned.

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[238] See especially Aleinikoff, Aliens, Due Process, and "Community Ties": A Response to Martin, 44 U. Pitt. L. Rev. 237 (1983); Hart, note 224 supra, at 1393 n.92; Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165 (1983); Verkuil, note 9 supra, § III.

[239] Greenholtz v. Inmates of Neb. Penal & Correction Complex, 442 U.S. 1, 10 (1979); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1295 (1975); Verkuil, note 9 supra, at 1149-50. See especially McInnes v. Onslow Fane [1978] 3 All E.R. 211, 218 (Ch.)

[240] I.N.S. v. Rios-Pineda, 105 S.Ct. 2098 (1985); I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981).

[241] I.N.S. v. Phinpathya, 464 U.S. 183 (1984); I.N.S. v. Chadha, 462 U.S. 919 (1983); cf. I.N.S. v. Stevic, 104 S.Ct. 2489 (1984)(mandatory relief).

A deportation order is preceded by a formal evidentiary hearing that results in the compilation of a detailed administrative record. That factor also points toward B.I.A. and court of appeals review, although as discussed earlier its importance should not be exaggerated.

The volume of deportation appeals is large, but not so great as to threaten the benefits of collegial review. The B.I.A. decided 1909 deportation cases in fiscal year 1984, a load it was able to handle even in combination with the 1222 cases of other types.[243] In the same year, the courts of appeals received 418 petitions for review of deportation orders.[244] That figure is also not overbearing, although the distribution of the cases among the circuits was very uneven.[245]

Other factors fortify the case for review of deportation orders by the B.I.A. and the courts of appeals. One factor is that that arrangement preserves the status quo, thus avoiding the temporary disruption engendered by change. Another is that the two forum choices are compatible; as discussed earlier, administrative review in the B.I.A. is itself a reason for judicial review in the courts of appeals, and vice-versa. The effects of these choices on the litigants' costs are minimal. At the administrative level, the A.A.U. and the B.I.A. would seem to require comparable attorneys' fees and expenses. They are located in the same metropolitan area;[246] litigants in both tribunals are generally represented by counsel;[247] and in each tribunal counsel normally submit written briefs and sometimes participate in oral argument.[248] At the judicial level, court of appeals review is theoretically costlier to the alien because, on the average, the distance to the nearest court of appeals will be greater than the distance to the nearest district court. That was a concern at the time the 1961 amendments were enacted,[249] but complaints along those lines have not been heard in recent years,[250] probably because the immigration bar is based disproportionately in cities where courts of appeals regularly schedule oral argument.[251]

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[242] See the frequently quoted passage from Yuen Sang Low v. Attorney General, 479 F.2d 820, 821 (9th Cir. 1973)("We are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.")

[243] See Appendix, infra.

[244] Interview with Bombaugh, note 204 supra.

[245] The 1984 Report of the Director of the Administrative Office of the United States Courts, which covers the year ending June 30, 1984 (not the fiscal year, which ends September 30), shows a total of 490 I.N.S. decisions "appealed" to the courts of appeals, of which 307 were filed in the Ninth Circuit. Id., Table 4, at 110. It is not clear whether those figures

Although other factors point in the opposite direction, they tend to be either minor in their impact or difficult to apply. One such factor, applicable only at the judicial level, is rate of appeal. Because deportation orders have been reviewable exclusively in the courts of appeals since 1961, it is difficult to predict what proportion of district court decisions would be appealed to the courts of appeals if two-tier review were reinstated. There are two possible ways to estimate the rate.

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245. (continued) include I.N.S. decisions that were reviewed by district courts and then appealed to courts of appeals, or are limited to petitions for review of deportation orders. Either way, the concentration of cases in the Ninth Circuit is evident.

[246] The A.A.U. is located at the central I.N.S. office in Washington, D.C. The B.I.A. sits in Falls Church, Virginia.

[247] Interviews with Weinig, note 84 supra, and Holmes & Hurwitz, note 76 supra.

[248] See note 247 above.

[249] Report on H.R. 187, note 224 supra, at 34, 35 (minority report).

[250] Interview with Leiden, note 6 supra.

[251] See the Geographical Listing of the American Immigration Lawyers Association (Nov. 1984). The listing reveals especially heavy concentrations of immigration lawyers in the environs of Los Angeles and San Francisco, cities in which the Ninth Circuit holds oral argument. That fact is critical in view of the disproportionate importance of the Ninth Circuit in immigration cases. See note 245 supra. The Geographical List also shows large numbers of immigration lawyers in Atlanta, Boston, Chicago, Miami, New York, Philadelphia, and Washington, D.C. -- all cities in which oral argument is regularly held. The only cities that house a large immigration bar and that are not the sites of regularly scheduled oral argument are Dallas and Houston, where the Fifth Circuit holds oral argument on occasion.

One method is to focus on section 106(a)(9) of the Immigration and Nationality act. That provision is the exception that authorizes district court review of deportation orders by habeas corpus when aliens are held in custody. In fiscal year 1984, 66 such cases were filed in the district courts, and 11 district court decisions denying deportation-related habeas corpus applications were appealed to the courts of appeals.[252] Although the appeals were not all from those district court cases that were filed in the same fiscal year, the promptness with which habeas applications are processed makes it likely that the appeal rate for the group at least approximates 11/66, or 17%. That rate is lower than the 30% that Currie and Goodman estimated as the break-even point with respect to total judge-time, but there are problems in extrapolating from this sample. First, the size of the sample is very small. Second, since the sample is composed only of those aliens who are held in custody, it contains two systematic, though countervailing, biases. On the one hand, aliens in custody have more at stake, and thus might be expected to appeal more frequently. On the other hand, since they are restrained,[253] they have less incentive to file frivolous appeals to prolong the deportation process.

An alternative approximation might be based on the pre-1961 experience. Evidence presented to the House immigration subcommittee showed appeal rates, for fiscal years 1954 through 1957 inclusive, that ranged from 17% to 29%.[254] But projections are tenuous. Today, because the immigration bar is so much larger, more aliens have access to counsel. The stakes might also be greater today, since far more deportation cases turn on asylum claims and the appeal rates tend to be higher when asylum is sought.[255] Future appeal rates might thus be highly sensitive to changes in the world refugee situation, as well as to changes in I.N.S. detention policy.

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[252] Interview with Bombaugh, note 204 *supra*.

[253] The restraint is not necessarily physical detention, however. *See* notes 260-62 *infra* and accompanying text.

[254] *See* *Hearings Before House Immigration Subcommittee*, 35 Interpreter Releases No. 26, at 192 (July 18, 1958) (testimony of H. Rosenfield). In fiscal year 1961, the last full year before the 1961 amendments became effective, the appeal rate inexplicably dropped to 9%. *See* Foti v. I.N.S., 308 F.2d 779, 785 n.6 (2d Cir. 1962), *rev'd*, 375 U.S. 217 (1963).

[255] In fiscal year 1984, within the class of deportation cases that originated in district court because the aliens were in custody, the ratio of appeals to district court filings was 6 to 15 when asylum was an issue, and 5 to 51 when it was not. *See* Appendix, *infra*.

For all these reasons, the anticipated appeal rate should not be weighted heavily.

One advantage of reinstating district court review of deportation orders is that there would then be no immigration-related decisions reviewable directly in the courts of appeals. Consequently, when aliens seek review of orders collateral to deportation, there would be neither jurisdictional confusion nor bifurcation of individual cases. Evaluation of these advantages requires analysis of the options for reviewing the collateral orders, and thus will be deferred until the discussion of the latter.[256] That analysis will show that the practical disadvantages of direct court of appeals review of deportation orders are not great and, in any event, can be lessened.

The last consideration is constitutional. Two limitations, both accommodated by existing statutory mechanisms, are relevant here. When a bona fide claim of United States nationality is advanced as a defense to deportation, procedural due process requires a de novo judicial trial.[257] The current statute provides that procedure.[258]

The other pertinent limitation is the constitutional bar on suspending habeas corpus.[259] As noted above, section 106(a)(9) of the Act permits aliens "held in custody" pursuant to deportation orders to apply for habeas corpus in the district courts. Numerous issues, worthy of a separate paper, are raised. The problems can be outlined briefly.

First, as a matter of statutory interpretation, is the habeas remedy provided by section 106(a)(9) confined to the constitutional minimum, or is the section comparable in scope to the (broader) general federal habeas corpus statute?[260] There are at least two subissues here: availability of habeas and scope of review. Availability turns on the meaning of the word "custody." Under the Immigration and Nationality Act, the Attorney General has the discretion whether to detain an alien pending the execution of a deportation order.[261] If the Attorney General elects not to detain, and the alien is released on bond or released subject to travel restrictions, is the alien in custody for purposes of section 106(a)(9)? The Supreme Court has made clear in other contexts that the general federal habeas statute does not require actual incarceration; certain other restraints on liberty will suffice.[262] The courts are divided over whether section 106(a)(9) should be similarly interpreted.[263] As to scope of review, the question is whether section 106(a)(9) permits review of the underlying deportation order, or merely review of the lawfulness of the temporary restraint, or something in between. On that question, too, the decisions are in conflict.[264]

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[256] See notes 400-26 infra and accompanying text.
[257] Ng Fung Ho v. White, 259 U.S. 276 (1922).
[258] I. & N. Act § 106(a)(5), 8 U.S.C. § 1105a(a)(5).
[259] U.S. Const. art. I, § 9, cl. 2.
[260] 28 U.S.C. §§ 2241 et seq.
[261] I. & N. Act § 242(c), 8 U.S.C. § 1252(c).

Second, as a matter of constitutional law, when *is* a restriction on habeas corpus permissible? That question is difficult enough to answer in the abstract. The history of the constitutional prohibition is sparse, and the existence of a broadly construed federal habeas statute has enabled the Supreme Court to avoid the constitutional issue.[265] The question takes on added complexity in the deportation context, for the Supreme Court has frequently held that the congressional power to regulate immigration is subject to few constitutional constraints.[266] The one constraint that does clearly apply to deportation cases, however, is procedural due process.[267] Perhaps the same desire to afford a procedure for redress would impel the Court to hold the constitutional habeas provision likewise applicable, but there is no way to predict with confidence.

Third, apart from the problems of interpreting either the various statutory provisions or the Constitution, under what circumstances is it good policy to make habeas available to aliens who have been ordered deported? Only when the alien is physically detained? Whenever the alien's movement or activities are restricted, for example by imposition of bond or by limitations on travel or association? Whenever a deportation order is issued? Competing values must be balanced. On the one hand, district court review of deportation orders undercuts the general advantages, discussed above, that result from direct court of appeals review. On the other hand, habeas furnishes a prompt remedy that becomes vital when individual liberty is significantly curtailed.

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[262] The leading cases are Jones v. Cunningham, 371 U.S. 236 (1963)(parolee may invoke habeas) and Hensley v. Municipal Court, 411 U.S. 345 (1973)(person released on own recognizance before start of criminal sentence may invoke habeas).

[263] *See* *Aleinikoff & Martin*, note 8 *supra*, at 599-611; Gordon, *Habeas Corpus -- New Limits for an Ancient Remedy?*, 4 Imm. J. 7, 23 (1981).

[264] *See* *Aleinikoff & Martin*, note 8 *supra*, at 599-611.

[265] *See* Beck, Congressional Research Service, Memorandum to Hon. Bill McCollum, at 14-15 (July 19, 1982).

[266] *See generally* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S.Ct. Rev. 255.

[267] *Id.* at 259.

Fourth, again as a matter of policy, how broad should the scope of review be once it is decided that habeas will lie? Should the court be limited to reviewing the lawfulness of the restraint? Or should habeas be a vehicle for obtaining judicial review of the underlying deportation order or, as one variant, review of certain discretionary decisions ancillary to deportation? Questions as to availability and scope of review are related because, the more widely available habeas is, the narrower the scope of review must be if the habeas exception is not to swallow the general rule that deportation orders are reviewable exclusively in the courts of appeals.

Fifth, once the policy decisions are made, how should the statute be worded? The existing habeas provision for deportation orders, as noted earlier, has produced conflict and confusion. Redrafting is needed. But what should the statute say? One approach would be to spell out precisely what type of restraint is necessary before an alien ordered deported may apply for habeas, and precisely what the court may review when habeas is available. An alternative, which would maximize the number of cases for which court of appeals review is exclusive, would be to permit habeas only "to the extent required by the Constitution." That approach would also remove the possibility of later judicial invalidation, but it would produce serious jurisdictional uncertainty for an indefinite period of time.

B. Exclusion

As explained earlier, the decision whether to exclude an alien who has applied for admission is made by an immigration judge.[268] Either the alien or the I.N.S. may appeal to the B.I.A.[269] The alien may obtain judicial review by applying for habeas corpus in the district court.[270] Either side may appeal the district court decision to the court of appeals.[271]

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[268] I. & N. Act § 236(a), 8 U.S.C. § 1226(a). The immigration officer at the border makes a preliminary determination whether the alien is "clearly and beyond a doubt entitled to land." Id. § 235(b), 8 U.S.C. § 1225(b).

[269] 8 C.F.R. § 3.1(b)(1) (1985).

[270] I. & N. Act § 106(b), 8 U.S.C. § 1105a(b). The early cases assumed that final administrative orders of exclusion were subject to no judicial review. See, e.g., Lee Lung v. Patterson, 186 U.S. 168 (1902); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Nishimura Ekiu v. United States, 142 U.S. 651 (1892). Eventually, aliens seeking review of exclusion orders turned successfully to habeas corpus, although for a while review by declaratory judgment actions still was not permitted. See Tom We Shung v. Brownell, 346 U.S. 906 (1953). Then, after the enactment of the 1952 Act, the Supreme Court interpreted the new legislation as permitting judicial review not only by habeas corpus, but also by actions for declaratory

The following discussion will show that the general forum selection factors strongly favor the B.I.A. over the A.A.U. in exclusion cases. Indeed, there has been no apparent movement toward change.[272] But many of those same factors also suggest transferring judicial review to the courts of appeals. Bills have been introduced in Congress to do just that.[273]

Impact is one of the more critical factors, and in exclusion cases it can be difficult to assess. Excluded aliens are commonly assumed to have less at stake than deported aliens, partly because exclusion is merely the denial of a benefit while deportation is the removal of a benefit. This principle is reflected in some of the cases that confer broader constitutional protection in deportation proceedings than in exclusion proceedings.[274] The statute and judicial interpretations reflect a similar philosophy.[275]

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270. (continued) or injunctive relief. Brownell v. Tom We Shung, 352 U.S. 180 (1956). Finally, in 1961, Congress amended the Act to make habeas corpus the exclusive form of judicial review of exclusion orders. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b).

[271] 28 U.S.C. § 1291.

[272] There have been proposals, however, to give the B.I.A. statutory recognition and to change its name. _See, e.g._, H.R. 30, 99th Cong., 1st Sess., § 211 (Rep. Roybal, Jan. 3, 1985); H.R. 1510, 98th Cong., 1st Sess., § 122 (Rep. Mazzoli, Feb. 17, 1983); S. 529, 98th Cong., 1st Sess., § 122 (Sen. Simpson, Feb. 17, 1983). There have also been proposals to substitute a summary exclusion procedure in certain cases. _See, e.g._, Mazzoli bill, _supra_, §§ 121, 122; Simpson bill, _supra_, §§ 121, 122. That possibility is presently the subject of a separate study by the Administrative Conference.

[273] _E.g._, H.R. 1510, 98th Cong., 1st Sess., § 123 (Rep. Mazzoli, Feb. 17, 1983); H.R. 2361, 98th Cong., 1st Sess., § 122 (Rep. Roybal, March 24, 1983). _See also_ the discussion on specialized courts, § IV _supra_.

[274] _See, e.g._, Fong Yue Ting v. United States, 149 U.S. 698, 762 (1893)(Fuller, C.J., dissenting). _See generally_ _Aleinikoff & Martin_, note 8 _supra_, ch. 5, § C; _Hart_, note 224 _supra_, at 1392-93; _Legomsky_, note 266 _supra_, at 260-61. Those cases may rest also on territorial considerations. _See_ _Aleinikoff & Martin_, _supra_, at 454; _Legomsky_, _supra_, at 275-77.

[275] _E.g._, the statutory deportation grounds are generally fewer and narrower than the exclusion grounds. Compare I. & N. Act §§ 212(a), 241(a), 8 U.S.C. §§ 1182(a), 1251(a). Ambiguities in deportation provisions are generally to be construed in favor of the aliens, I.N.S. v. Errico, 385 U.S. 214, 225 (1966);

But so clean a separation ignores the practicalities. As has been pointed out elsewhere,[276] much can be at stake for the excluded alien. With the demise of non-preference immigrant visas,[277] virtually the only aliens applying for admission as immigrants are those who claim either to qualify as refugees or to fit a statutory preference. The latter category is reserved for those who have either close family members or a needed skill and a prospective employer in the United States.[278] In all those cases the individual interests are potentially great. Moreover, as with deportation, the magnitudes of the interests are subject to many variables, including immigrant versus nonimmigrant and initial entrant versus returning resident.[279] Further, just as the alien has an interest in securing admission, the public has an interest in assuring the exclusion of those aliens whose presence Congress has declared detrimental.

For all those reasons, the potential impact of the exclusion decision seems great enough to justify the use of a collegial tribunal, at least for intending immigrants. This factor points, therefore, toward review in the B.I.A. and in the courts of appeals. A different conclusion is possible as to non-immigrants, but factors other than impact suggest similar treatment even for that class, as discussed below.

An exclusion hearing is a quasi-formal, transcribed, evidentiary proceeding that yields an administrative record as detailed as that compiled in a deportation case.[280] That factor, which reduces the likelihood that a reviewing tribunal will need to take additional evidence, also favors the B.I.A. and the courts of appeals.

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275. (continued) Fong Haw Tan v. Phelan, 333 U.S. 6 (1948), a principle not yet applied to exclusion. In deportation proceedings, the statute has been construed to place on the government the burden of proving its case by "clear, convincing, and unequivocal evidence." Woodby v. I.N.S., 385 U.S. 276, 286 (1966); Rassano v. I.N.S., 492 F.2d 220 (7th Cir. 1974). Again, that principle has not been invoked in exclusion cases.

[276] See Aleinikoff & Martin, note 8 supra, ch. 5, § C.

[277] See note 20 supra.

[278] See Aleinikoff & Martin, note 8 supra, ch. 3, § A(2, 3, 4); id. ch. 8.

[279] This point is made very effectively by Aleinikoff & Martin, note 8 supra, ch. 5, § C.

[280] See I. & N. Act § 236(a), 8 U.S.C. § 1226(a); 8 C.F.R. § 236 (1985).

Absent a world event that produces a sudden influx of aliens -- as happened recently in Cuba and in Haiti -- the number of cases in which aliens seek either administrative or judicial review of exclusion orders tends to be small. In fiscal year 1984, the B.I.A. decided 307 exclusion cases (10% of its total caseload),[281] and the federal district courts adjudicated only 27 habeas corpus applications challenging exclusion orders.[282] Several factors keep the numbers low. Inadmissible aliens are ordinarily screened out at the visa application stage; thus, except for asylees, aliens without visas normally have no reason to travel to the United States to apply for admission.[283] In addition, even when an immigration officer stationed at an entry point does refuse admittance, the alien frequently accepts that decision rather than demand a formal hearing before an immigration judge. There are various motivations: Under current I.N.S. practice, the alien is generally incarcerated pending the hearing;[284] once an alien is formally excluded, the statute bars reentry for one year;[285] and the alien might simply be unable to afford counsel.[286] As noted earlier, the low volume tends to favor review by the B.I.A. and by the courts of appeals.

Another factor reinforcing that result is the similarity between the issues typically raised in exclusion proceedings and those raised in deportation proceedings. One common deportation ground, for example, is that the alien was excludable at the time of entry.[287] Even apart from that specific example, the exclusion grounds and deportation grounds cover similar conduct and use similar language that raises similar interpretation problems.[288] Further, certain of the waiver provisions described earlier apply in both exclusion cases and deportation cases,[289] and even those that do not often share several common elements.[290]

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[281] See Appendix, infra.

[282] Id. There were also at least 51 habeas cases in which excluded aliens challenged only their detention. Interview with Bombaugh, note 204 supra.

[283] See I. & N. Act §§ 212(a) (grounds for visa denials same as grounds for exclusion), 212(a)(20, 26) (alien not in possession of proper entry documents inadmissible), 8 U.S.C. §§ 1182(a), 1182(a)(20, 26). Further, certain aliens may be "pre-inspected" at foreign points. See 8 C.F.R. § 235.5 (1985); Gordon & Rosenfield, note 8 supra, at 3-163 to 3-164.

[284] Interview with Paul Schmidt, Deputy General Counsel, I.N.S. (June 11, 1985). See 8 C.F.R. §§ 235.3(b) (aliens without documents or with false documents), 235.3(c) (aliens with documents), 212.5 (factors in deciding whether to parole)(1985), amended by 47 Fed. Reg. 46493 (Oct. 19, 1982).

[285] I. & N. Act § 212(a)(16), 8 U.S.C. § 1182(a)(16).

[286] All these reasons for the low volume were expressed by Bombaugh, note 204 supra, and Leiden, note 250 supra. The latter cited intimidation by the immigration officer as another possible factor.

[287] I. & N. Act § 241(a)(1), 8 U.S.C. § 1251(a)(1).

Those similarities are significant in two ways. They permit the extrapolation, to exclusion cases, of many of the reasons advanced for B.I.A. and court of appeals review of deportation orders. In addition, as developed earlier, once it is decided to channel deportation cases to the B.I.A. and to the courts of appeals, there are several advantages to having those bodies review cases presenting similar issues.[291]

The forum choices for administrative review and judicial review also affect one another. If B.I.A. review of exclusion orders is preserved, then for reasons given earlier[292] court of appeals review would be beneficial.

Analysis of the costs to the litigants is the same as that for deportation. At the administrative level, the choice between the A.A.U. and the B.I.A. has no apparent effect on litigants' costs. The lesser proximity of the courts of appeals may be a cost factor in theory, but, as with deportation, the distribution of the immigration bar reduces the practical relevance of that consideration.[293]

Aliens seeking admission are sometimes "paroled" into the United States for emergent reasons pending the decision whether to exclude.[294] Once paroled, the alien has an incentive to prolong the process through frivolous litigation. In theory, therefore, another benefit of direct court of appeals review would be to eliminate one step and thus decrease the incentive to delay. In practice, however, this consideration does not seem significant. The paucity of appeals from district court exclusion cases[295] suggests that in this area delay is not a problem. Further, the I.N.S. decision to make detention the norm rather than the exception[296] greatly reduces the number of aliens who would benefit from delay.

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[288] Compare generally id. §§ 212(a) (exclusion), 241(a) (deportation), 8 U.S.C. §§ 1182(a), 1251(a). See especially the similarities in the grounds pertaining to criminal conduct, ideology, and morals.

[289] E.g., I. & N. Act §§ 212(c), 243(h), 8 U.S.C. §§ 1182(c), 1253(h). As to section 212(c), see Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976).

[290] See the provisions cited in notes 26, 27, 29, 30 supra.

[291] See § II.C.6 supra.

[292] See § II.C.9 supra.

[293] See note 251 supra and accompanying text.

[294] See I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5).

[295] In fiscal year 1984, only two such appeals were filed; twenty-seven habeas actions were brought in the district court to challenge exclusion orders. See Appendix, infra.

The factors discussed thus far point generally to the B.I.A. and to the courts of appeals. B.I.A. review presents no significant problems, but court of appeals review does have some potential disadvantages. The status quo would be altered. The disruption should be minimal, however, because the volume is small, the new procedure would be one that is already familiar, and no additional training would be required. The current rate at which district court decisions reviewing exclusion orders are further appealed is negligible.[297] And, since many kinds of immigration decisions are collateral to exclusion,[298] assignment of exclusion cases to the courts of appeals could trigger jurisdictional disputes and could result in bifurcation of cases, as with deportation. The problem of collateral orders is considered later.

But the most serious difficulty with court of appeals review of exclusion orders is one of timing. As noted earlier, most excluded aliens are now detained pending administrative and judicial review. Those aliens need ways of testing the legality of their detention promptly. Even aliens temporarily paroled into the United States are in limbo as they await the outcome of the litigation. For them, speed is also paramount. Courts of appeals are cumbersome vehicles for emergency decisionmaking. A habeas application in the district court is more conducive to rapid disposition. Whether or not habeas is constitutionally compelled,[299] its availability is desirable when restrictions on liberty make speed important.

Can these competing concerns be accommodated? One option would be to make court of appeals review generally exclusive but to create an exception permitting detained aliens to challenge their exclusion orders by habeas corpus in the district courts. Such a change would permit the advantages of court of appeals review to operate in those cases where habeas is not sought. The disadvantage, however, would be that aliens whose liberty has been constricted in ways less severe than detention would have to wait longer for judicial determinations as to the legality of the restraint. This last problem could simply be tolerated, or it could be cured by broadening the exception to include significant incursions on freedom of movement. But unless the contemplated restrictions can be both predicted and articulated in advance, it would be difficult to draft statutory language both elastic enough to cover serious future restrictions and specific enough to supply reasonable jurisdictional certainty. The statute could, for example, parallel the current deportation provision: the courts of appeals have exclusive jurisdiction, except that aliens "held in custody" may apply for habeas corpus in the district court. That course would be plausible in exclusion cases as well, but, as discussed earlier, the disadvantage is that the word "custody" has triggered wasteful jurisdictional litigation.

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[296] Interview with Schmidt, note 283 supra.

[297] See note 295 supra.

[298] See notes 26-27, 37-43 supra and accompanying text.

[299] It is not clear whether the present statutory provision, I. & N. Act § 106(b), 8 U.S.C. § 1105a(b), authorizes habeas when the alien is not in detention. The statutory language suggests that detention is not required. It refers to "any alien against whom a final order of exclusion has been made"; it provides for review of the exclusion order (not just the detention); and it states not only that no other review is available, but also that habeas is available. The House Judiciary Committee Report preceding the 1961 enactment of this statutory provision assumed that all excluded aliens -- not merely those physically detained -- would be able to obtain

An alternative, which I favor, is simply to give the excluded alien a choice. He or she could either apply for habeas corpus in the district court (with a right of appeal by either party to the court of appeals) or directly petition for review in the court of appeals -- but not both. Either court would have jurisdiction to review the legality of the temporary restraint and the validity of the underlying exclusion order.

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299. (continued) review by habeas corpus. The committee relied on this assumption in concluding that restricting excluded aliens to habeas would not deprive them of any opportunities previously enjoyed through use of declaratory judgment actions. _See_ _Report on H.R. 187_, note 225 _supra_. _But see_ the minority report, _id._ at 32-33 (assuming detention required). _See also_ _Aleinikoff & Martin_, note 8 _supra_, at 567-68 (assuming that "custody" is a prerequisite to use of section 106(b)); _Steel_, note 8 _supra_, at 388 (assuming "detention" not prerequisite).

The constitutional limitations are equally uncertain. The early cases that refused review after reading the statute to preclude it, _see_ note 270 _supra_, would seem to stand _sub silentio_ for the proposition that the Constitution similarly does not compel habeas in exclusion cases. The difficulties attending the analogous question in deportation cases, _see_ notes 260-67 _supra_ and accompanying text, are even more pronounced here, since excluded aliens have even fewer constitutional rights than deported aliens. _See_ note 266 _supra_. As with deportation, the questions in exclusion cases include whether detention is (a) necessary and (b) sufficient to trigger a constitutional right to habeas corpus, and whether, if habeas is required, its scope encompasses review of the underlying exclusion order as well as the legality of the detention.

As a practical matter, since most excluded aliens are now temporarily detained, the majority of those aliens who want judicial review of exclusion orders will probably select the habeas corpus option because it will tend to be the speedier remedy. For them, the proposed change will have no effect. But those aliens who are not detained might well prefer the courts of appeals. When they make that choice, the previously discussed benefits of court of appeals review are permitted to operate: enhanced coherence of legal doctrine, both within the exclusion area and between exclusion and deportation; compatibility of the administrative and judicial review forums; the added suitability of the courts of appeals for cases in which formal records have been compiled; and more careful decisionmaking in cases where the impact on the individual is potentially great. The disadvantage of this proposal is that it would preserve the capability of the non-detained alien to employ two-tier review to increase the delay. In that respect, however, the alien's capacity to delay the outcome would be no greater than it is under current law, and as shown above delay has not been a problem in exclusion cases thus far. Moreover, establishing concurrent jurisdiction would eliminate the kinds of jurisdictional squabbles that have plagued the analogous habeas provision for deportation cases.[300]

When the Administrative Conference debated the present proposal, a snag developed. As noted earlier, aliens who have been ordered excluded are normally detained in the United States pending review, although occasionally an alien is "paroled" into the country for emergent reasons and permitted to remain at large.[300A] In either case, the question arises whether the I.N.S. should be free to remove the alien from the United States while judicial review is pending. The statute creates an automatic stay of deportation orders pending judicial review,[300B] but it contains no analogous provision for exclusion orders. Thus the alien is removable unless the reviewing court, in its discretion, grants a stay. The Department of Justice opposes creating automatic stays of exclusion because it fears that the availability of such stays would encourage aliens to seek review in frivolous cases to delay their removal. The Department urged the Conference not to recommend direct court of appeals review of exclusion orders unless the Conference was also prepared to take a position on stays.[300C]

My own view is that the automatic stay should be extended to exclusion orders regardless of whether review is assigned to

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300. See notes 260-67 supra and accompanying text.

300A. See notes 284, 294 supra and accompanying text.

300B. 8 U.S.C. § 1105a(a)(3).

300C. Dept. of Justice, Alternative Recommendation on Judicial Review in Immigration Proceedings 2 (Dec. 12, 1985).

the district courts or the courts of appeals. Whatever delay deportation appeals might be thought to cause,[300D] I do not see analogous problems in exclusion cases. For all the reasons given earlier, the excluded alien rarely has any incentive to delay the outcome.[300E] Further, under the present system, aliens who seek judicial review of exclusion orders must couple their habeas corpus applications wih motions to stay their exclusion until the court has ruled. The reviewing court must therefore decide, on an emergency basis, whether to stay the exclusion; then it must reexamine the case at a later time to reach a decision on the merits. All of this might be worthwhile if the effect were to screen out frivolous cases and thus avoid the second step. But in practice the stay motions are virtually always granted.[300F] Thus, for all practical purposes, the stay presently is automatic; yet, as noted earlier, only a handful of aliens seek judicial review of exclusion orders each year. And if further assurance against frivolous review petitions is thought necessary, a provision automatically staying exclusion pending judicial review could contain the same safeguard as the analogous provision for deportation: authority for the reviewing court to dissolve the stay at any time.[300G] Under the latter provision, the need for the court to perform the inconvenient and time-consuming task of studying the arguments twice--as it must presently do in all exclusion cases--would be confined to those cases that the I.N.S. argues are frivolous.

An automatic stay of exclusion would therefore make eminent sense. More important here, if an automatic stay were enacted, the argument for court of appeals review would if anything seem even more compelling. If the Justice Department's fear is that the automatic stay would encourage frivolous petitions for review, one would expect the Department to favor direct court of appeals review as a device for bypassing the district court and thus eliminating one element of the delay.

Assertions that the stay issue and the forum issue are interdependent came from one other quarter as well. Two United States circuit judges argued that, if there is no automatic stay, the reviewing court must be one that is well equipped to make emergency decisions--a characterization fitting the

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300D. See notes 223-36 supra and accompanying text.

300E. See notes 281-86, 294-96 supra and accompanying text.

300F. Telephone interview with Robert C. Bombaugh, Director, Office of Immigration Litigation, Civil Division, Dept. of Justice (Dec. 9, 1985) (district court "almost always" grants stay; "unable to recall a single case" in which stay refused).

300G. 8 U.S.C. § 1105a(c).

district courts more easily than the courts of appeals.[300H] The point is very well taken, but I am not persuaded that it is a strong enough reason to reject concurrent jurisdiction. First, even courts of appeals have mechanisms for emergency decisionmaking. These devices are especially suitable when, as is true here, the number of cases requiring prompt decisions is so small. A motions panel could be assigned the task of adjudicating the stay issue soon after the case is filed. If logistical constraints make a prompt collegial decision impracticable, stays could be decided by single circuit judges.[300I] Collegiality would be lost, but no more so than if district judges were making the decisions. Second, a better and more direct way to meet the concern of the circuit judges would be to make the stay automatic. As just noted, there are strong, independent, reasons for choosing that course.

C. Other Orders

Section I described many of the other, miscellaneous, orders issued under the Immigration and Nationality Act. Some such decisions are made by immigration judges during the course of formal exclusion or deportation hearings. Others, also made by immigration judges, are the subjects of their own formal proceedings. Still other orders are entered by district directors after less formal procedures. Some of those, if adverse to the aliens, can set the stage for subsequent formal exclusion or deportation proceedings, in which the denied applications might or might not be renewable.

The Attorney General's regulations specify, with laudable clarity, which of these decisions are administratively appealable and to whom.[301] Certainty is not a problem.

But rationality is another question. David Carliner, writing in 1960, criticized forcefully the then existing scheme by which administrative appeals were allocated between the B.I.A. and the regional commissioners.[302] If there are patterns in the present distribution between the B.I.A. and the Associate Commissioner for Examinations, they are no more obvious now than analogous patterns were then.

[300H] Comments of Hon. Stephen Breyer, Hon. Jerre S. Williams, Plenary Session of Admin. Conf. of U.S. (Dec. 12, 1985).

[300I] Compare to 28 U.S.C. § 2253 (single circuit judge authorized to issue certificate of probable cause, a document essential to appeal from district court decision denying habeas relief from state conviction).

[301] See 8 C.F.R. §§ 3.1(b), 103.1(f)(ii) (1985); see also notes 72-98 supra and accompanying text.

[302] Carliner, Administrative Consideration and Review of Immigration Appeals, 37 Interpreter Releases 340 (Nov. 1, 1960).

The one relatively steady pattern is the assignment to the B.I.A. of appeals from those decisions that were made by immigration judges.[303] Even that generalization is not perfect,[304] however, and, more important, there is no apparent rhyme or reason to the distribution of appeals from district directors' decisions. Nor did an exhaustive search of the Federal Register reveal past reasons for choosing particular forums for appeals from particular orders. It might be, as several seasoned observers whom I interviewed suggested, that the placement decisions were simply the products of turf wars within the Justice Department at a time when the regional commissioners were exercising the appellate jurisdiction now centralized in the Associate Commissioner for Examinations.[305]

The statutory provisions governing judicial review of immigration decisions present the opposite problem. As discussed earlier,[306] some of those provisions are lacking in certainty. Unlike the system of administrative review, however, the general scheme of judicial review cannot be described as irrational. Even so, some improvements are possible. The discussion that follows will contain a number of recommendations.

Given the plethora of administrative decisions required by the Immigration and Nationality Act and accompanying regulations, detailed examination of all the miscellaneous orders is not practical. It is both feasible and worthwhile, however, to study selected examples. The selections in this subsection are based on the practical importance of the particular order and on the illustrative value of applying to that order the general forum selection criteria developed in section II.

Whether a particular forum is appropriate for a particular order can depend on the context in which the order is issued. It will first be assumed that the alien is not the subject of an exclusion or deportation order. Under that assumption, the issue is where, if at all, the miscellaneous order should be independently reviewed. Next, an outstanding exclusion or deportation order will be posited. The issues then become whether the miscellaneous order and the exclusion or deportation order should be reviewed together and, if so, in what tribunal.

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[303] See 8 C.F.R. § 3.1(b)(1,2,7,8) (1985).

[304] When an immigration judge decides whether to withdraw the approval of a school, see id. § 214.4, appeal lies to the Associate Commissioner for Examinations, id. § 103.1(f)(2)(ix).

[305] The suggestion was that the assignment of appeals to the regional commissioners was a political concession to them. See also notes 58, 154 supra.

[306] See notes 99-120 supra and accompanying text.

1. Visa Petitions

A "visa petition" is a standardized form, supplemented by documentary evidence, asking the I.N.S. to classify a given alien as one who fits the terms of a claimed statutory preference. With only narrow exceptions, the district director's approval of a visa petition is a prerequisite to either admission for permanent residence[307] or adjustment of status to permanent residence.[308] It is also a requirement for admission of certain non-immigrants, including fiancé(e)s of American citizens[309] and temporary workers.[310]

At present, denials of some visa petitions are appealable to the B.I.A. while denials of others are appealable to the A.A.U. When visa petitions seek immigrant preference based on occupation,[311] appeal lies to the A.A.U.[312] The same is true when prospective non-immigrants seek to enter as temporary workers under what are commonly called "H" or "L" visas.[313] In contrast, when visa petitions are based on family preference,[314] denials are generally appealable to the B.I.A.[315] Here, however, there are two exceptions. If the alien is an orphan who has been adopted by an American family,[316] a denial is appealable to the A.A.U.[317] The same is true when an alien seeks admission as the fiancé or fiancée of an American citizen.[318]

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[307] The alien is inadmissible without a visa, I. & N. Act § 212(a)(20), 8 U.S.C. § 1182(a)(20), and the consulate will not issue the visa until the visa petition authorized by *id.* § 204, 8 U.S.C. § 1154, has been approved. *See* 22 C.F.R. §§ 42.41, 42.42 (1985).

[308] 8 C.F.R. § 245.2(a)(2) (1985).

[309] *See* I. & N. Act §§ 101(a)(15)(K), 214(d), 8 U.S.C. §§ 1101(a)(15)(K), 1184(d).

[310] *Id.* §§ 101(a)(15)(H, L), 214(c), 8 U.S.C. §§ 1101(a)(15)(H, L), 1184(c).

[311] *Id.* § 203(a)(3, 6), 8 U.S.C. § 1153(a)(3, 6).

[312] 8 C.F.R. § 103.1(f)(2)(ii) (1985).

[313] The letters refer to the statutory subsections establishing the particular non-immigrant classifications. *See* I. & N. Act §§ 101(a)(15)(H) (aliens of "distinguished merit and ability" coming to render temporary services; temporary laborers when unemployed Americans cannot be found; and trainees), 101(a)(15)(L) (intra-company, management-level, transferees), 8 U.S.C. § 1101(a)(15)(H, L). Appellate jurisdiction is conferred by 8 C.F.R. § 103.1(f)(2)(x) (1985).

[314] I. & N. Act § 203(a)(1, 2, 4, 5), 8 U.S.C. § 1153(a)(1, 2, 4, 5).

[315] 8 C.F.R. § 3.1(b)(5) (1985).

[316] *See* I. & N. Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F).

[317] 8 C.F.R. §§ 3.1(b)(5), 103.1(f)(2)(xxiv) (1985).

Judicial review, at least in the absence of an exclusion or deportation order, can be described more simply. All of the visa petition denials discussed here are reviewable in federal district court under section 279 of the Act.[319]

Whatever the historical reasons for the differences in administrative review forum, there are strong reasons today to provide for B.I.A. review of all the visa petitions discussed above. A case can also be made for shifting judicial review to the courts of appeals, though on that point the arguments are more evenly balanced.

Decisions denying family-based visa petitions are of obvious import to the parties. At stake is the reunification of a family, and the status sought is that of a permanent resident. The impact is as great as in an exclusion case because, as noted earlier, approval of the visa petition is a prerequisite to admission. High impact favors keeping administrative review in the B.I.A. and transferring judicial review to the courts of appeals.

Many of those cases raise only simple factual questions concerning the bona fides of a marriage, but legal issues also abound. The B.I.A. frequently resolves questions as to the legal requirements for "legitimation" and "adoption," although some of the latter issues also arise in the A.A.U. orphan cases.[320] Both kinds of issues often require interpretations of foreign law. Consequently, a high proportion of family-based visa petition cases culminate in published B.I.A. opinions.[321] The prevalence of the legal issues reinforces the case for B.I.A. and court of appeals review.

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[318] See I. & N. Act § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K); 8 C.F.R. § 103.1(f)(2)(x) (1985).

[319] 8 U.S.C. § 1329. All these visa petitions are filed pursuant to provisions contained in title II of the Act, see I. & N. Act §§ 204, 214(c, d), 8 U.S.C. §§ 1154, 1184(c, d), and thus fall within the jurisdiction conferred by section 279. See notes 479-88 infra and accompanying text.

[320] Legitimation issues arise under I. & N. Act § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C), and adoption issues under id. § 101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E). Though the A.A.U. has exclusive jurisdiction over orphan petitions, 8 C.F.R. § 103.1(f)(2)(xxiv), not all adoption petitions are for "orphans," as that term is defined in the Act. For example, to enter under the orphan provision, a child must be adopted by a United States citizen, I. & N. Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F), whereas the general adopted child provisions may be invoked also by an alien lawfully admitted for permanent residence. See id. §§ 101(b)(1)(E), 203(a)(2), 8 U.S.C. §§ 1101(b)(1)(E), 1153(a)(2).

At the administrative level, the volume is large but manageable. In fiscal year 1984, family-based visa petitions accounted for 635 cases, or 20% of the B.I.A. caseload.[322] That proportion is second only to deportation.[323] In the same year, a total of 152 immigrant visa petition cases were reviewed in the district courts, but data isolating those petitions that were based on family preference are not available.[324] The total figure represents a significant proportion of the total immigration litigation. That factor, which points toward preservation of district court review, is fortified by the extremely low frequency with which the district court decisions are appealed to the courts of appeals.[325]

The administrative record, though not normally containing a transcript of a formal evidentiary hearing, is nonetheless fairly detailed. The record typically contains the petition itself; the supporting documentary evidence; either a transcript of, or affidavits executed at, a taped question-and-answer session between the immigration examiner and the alien or counsel; the examiner's written decision containing reasons for the denial; the notice of appeal; and written briefs.[328] That record has thus far been adequate to permit B.I.A. review, without additional factfinding. There is no apparent reason that a court of appeals would be unable to perform the same task, especially after the B.I.A. has enhanced the record further by providing its own reasoned disposition.

Many analogous statements can be made about the orphan petitions, which are presently decided by the A.A.U. They, too, have enormous impact on the parties. Like the other family-based visa petition cases, orphan petitions often raise legal issues, such as the meaning of "abandonment."[329] Orphan cases can also raise many of the same issues as the other family cases concerning the adoption laws of foreign countries.[330] If those issues are generally going to be resolved by the B.I.A. in family cases, there would be gain in channeling the orphan cases to the B.I.A. as well. Further, the low volume of orphan cases[331] makes B.I.A. and court of appeals review feasible.

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[321] See Appendix, infra. See also I. & N. Act § 101(b)(1)(C, E), 8 U.S.C. § 1101(b)(1)(C, E).

[322] See Appendix, infra.

[323] Id.

[324] Id.

[325] In FY 1984, only five immigrant visa petitions were the subjects of appeals from district court decisions. Id.

[328] Interview with Holmes & Hurwitz, note 76 supra; Telephone interview with Paul Schmidt, Deputy Gen. Counsel, I.N.S. (Jan. 30, 1986). In the Southern District of New York, a consent decree requires the I.N.S., for all immediate relative petitions, to conduct and to record on tape formal hearings approaching those held by immigration judges. See the Stokes case, discussed in Gordon & Rosenfield, note 8 supra, at 3-57 to 3-59. The I.N.S. does not plan to implement Stokes nationwide. Telephone interview with Schmidt, supra.

The same factors generally favor B.I.A. and court of appeals review in fiancé(e) cases. Although a fiancé(e) is technically a non-immigrant,[332] the statute conditions admittance on the parties marrying within three months, at which time the alien becomes eligible for permanent residence.[333] Thus, the individual interests are functionally equivalent to those of an intending immigrant and his or her American citizen spouse. Again, the volumes for both administrative and judicial review are low.[334] The major countervailing consideration is that fiancé(e) cases tend generally to raise only relatively simple factual issues concerning the bona fides of the relationship or the solidity of the marriage plans. Even that last factor cuts both ways, however, at least with respect to administrative review. Since issues as to the genuineness of the marriage arise also in the spousal visa petitions heard by the B.I.A., directing the fiancé(e) cases to the same body would promote consistency.

Strong arguments can also be made for channeling to the B.I.A., and to a lesser extent the courts of appeals, denials of those immigrant visa petitions that are based on occupational preference. The impact is of a different nature from that in the family cases, but it is still great. The economic effects of the decision are felt by the alien who seeks to enter, the employer who seeks to hire, and the public for whose benefit the statutory occupational provisions were enacted.[335]

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[329] Interview with Holmes & Hurwitz, note 76 supra. See also I. & N. Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F).

[330] Id.

[331] The numbers of administrative appeals were too small to be separated out. Interview with Weinig, note 84 supra. See Appendix, infra. Separate figures are also unavailable for judicial review of orphan petitions, but the small numbers of administrative appeals virtually assures that judicial review is infrequent.

[332] I. & N. Act § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K).

[333] Id. § 214(d), 8 U.S.C. § 1184(d).

[334] Again, administrative appeals have not been segregated because of the low numbers. See Appendix, infra. Separate judicial figures are also unavailable, but the total number of district court cases reviewing all non-immigrant classifications was only 16. Id.

[335] See especially I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14).

Legal issues of first impression are common.[336] Certain of these petitions set precedents on the meaning of the word "professional," a subject of major concern to the immigration bar.[337] And the record is fairly sophisticated. It typically contains the original petition; documentary evidence describing the alien's work experience, the prevailing wages for that line of work, and the employer's business; a report of any investigation performed by the district office; the district director's written decision giving reasons for the denial; the notice of appeal; and a brief filed by the alien's attorney.[338] As discussed earlier, the Board is already accustomed, in the family cases, to handling appeals from high-volume, informal, visa petition denials.

Similar statements can be made about the employment-based visa petitions filed by nonimmigrants. Difficult and important legal issues are frequently presented.[339] The economic impact can again be quite significant, although the interests probably do not reach the same level as in the immigrant cases. The record is essentially analogous to that in the immigrant cases.[340] And, if the immigrant visa petitions are transferred to the B.I.A., as recommended here, the similarity of the issues would make it beneficial to transfer simultaneously the appeals from denials of non-immigrant employment petitions.

By far the strongest argument against moving either group of employment cases, at least at the administrative level, is their sheer volume. The immigrant employment preference petitions accounted for 625 of the 2649 cases decided by the A.A.U. in fiscal 1984. Another 803 of the A.A.U. cases involved nonimmigrant employment petitions ("H" and "L" visa petitions).[341] The analogous figures for judicial review are not known, but it is certain that at least the nonimmigrant employment cases are very few in number.[342] Court of appeals review might be manageable, depending on the data, but B.I.A. review of so large a number of cases would require major changes in either the size or the procedure of the B.I.A., as discussed below.

What conclusions can be drawn from the preceding discussion? As to administrative review, with only the qualification as to volume, the general forum selection factors strongly favor making all visa petition denials appealable to the B.I.A. Decisions in each of the various visa petition categories are potentially of vital importance to the parties. In the nonimmigrant employment cases, the impact is less pronounced, but even there important interests can be at stake. Moreover, if the immigrant employment cases are shifted to the B.I.A., the benefits arising from issue similarity might alone justify transferring the nonimmigrant cases as well. The administrative records are sufficiently detailed to eliminate any need for further factfinding by the reviewing tribunal. And, most important of all, these cases frequently raise complex legal issues with which the B.I.A. is far better equipped to deal.

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[336] Interview with Weinig, note 84 *supra*.

[337] Interview with Leiden, note 6 *supra*.

[338] Interview with Weinig, note 84 *supra*.

[339] *Id.*

[340] *Id.*

[341] *See* Appendix, *infra*.

[342] In fiscal year 1984, the district court decided 152 immigrant, and 16 nonimmigrant, visa petition cases. *See* Appendix, *infra*. Breakdowns by family versus employment are not available.

Volume, however, is a critical consideration. It is not a problem with the orphan and fiancé(e) petitions, where the numbers are small. But the A.A.U. currently decides more than 1400 employment-based visa petitions each year. It is fair to ask whether the B.I.A. could do justice to those cases and at the same time maintain the quality of its decisionmaking in the cases for which it is presently responsible.

The short answer is that, without certain structural changes, it could not. Adding the visa petition cases would increase the Board's caseload by almost half, and the Board's members and staff are already fully occupied. But coupling the case transfer with the Board's adoption of a panel system, as recommended below, would leave the personal caseload of each Board member roughly unchanged.[343] Additional vehicles for increasing the Board's productivity are also available.[344] Moreover, the Board's publication of precedent decisions might well have the salutary effect of reducing, over time, the number of appeals filed.

The same factors that favor B.I.A. review of visa petition denials also favor transferring judicial review to the courts of appeals. Here, however, countervailing considerations make the recommendations more tentative. The high volume poses the danger of straining already hard pressed collegial resources, and the very low appeal rate means that much circuit judge time would be saved by preserving district court review. The balance is a close one. No change in judicial review should be made until the statistical data can be more carefully segregated and the experience then observed for a longer period of time.

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[343] The total caseload would be slightly less than 3/2 of what it presently is, see note 427 infra and accompanying text, and each member would hear slightly more than 3/5 of the Board's cases, see notes 428-35 infra and accompanying text. In theory, therefore, the combination would leave each member with about 9/10 of his or her present caseload.

[344] See notes 436-37 infra and accompanying text.

2. Waivers

As discussed in section I, the Immigration and Nationality Act contains numerous provisions for automatic and discretionary waivers of designated exclusion and deportation grounds.[345] Applications for many of those waivers are made to immigration judges during exclusion or deportation proceedings; applications for others are made to district directors in advance of formal proceedings.[346] When an application of the former type is denied, the rules governing review are the same as those for the corresponding exclusion and deportation orders: Administrative review is by the B.I.A.;[347] judicial review is by the courts of appeals for orders entered in the course of deportation proceedings and by the district courts otherwise.[348]

When it is the district director who denies the waiver application, however, administrative review is by the B.I.A. in some cases and by the A.A.U. in others, as discussed below. In either case, absent a subsequent exclusion or deportation order, the judicial forum will be the district court.[349]

Before the general forum selection factors are applied to the various waiver provisions, a special problem concerning one such waiver should be noted. Section 212(c) of the Act[350] gives the Attorney General the discretion to waive specified exclusion grounds when an alien is returning to a lawful unrelinquished domicile of seven years in the United States. The B.I.A. and the courts have applied this provision in deportation proceedings as well.[351] Although 212(c) applications are normally filed with immigration judges during the course of the exclusion or deportation proceedings, they may also be filed with district directors before such proceedings are instituted.[352] The latter route is ordinarily chosen when the alien is a permanent resident who wishes to leave the country temporarily, and who seeks from the district director an advance determination that he or she will be admissible upon return. In those cases, the district directors' decisions are appealable to the B.I.A. under current regulations.[353]

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[345] See notes 26-30 supra and accompanying text.

[346] See notes 62-64 supra and accompanying text.

[347] See 8 C.F.R. § 3.1(b)(1, 2) (1985)(exclusion and deportation orders appealable to B.I.A.).

[348] The leading case is Foti v. I.N.S., 375 U.S. 217 (1963).

[349] All the statutory waivers of exclusion and deportation are authorized by title II of the Act and thus fall within I. & N. Act § 279, 8 U.S.C. § 1329. See notes 479-88 infra and accompanying text.

[350] 8 U.S.C. § 1182(c).

[351] Tapia-Acuna v. I.N.S., 640 F.2d 223 (9th Cir. 1981); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976); Matter of Hom, 16 I. & N. Dec. 112 (B.I.A. 1977); Matter of Silva, 16 I. & N. Dec. 26 (B.I.A. 1976).

The Attorney General has recently proposed eliminating B.I.A. jurisdiction over district directors' denials of 212(c) applications.[354] The announced rationale is that the 212(c) application may be renewed before the immigration judge in any subsequent exclusion or deportation proceeding, and the latter decision is already appealable to the B.I.A. Thus, the revision would "streamline" the procedure by removing the possibility of duplicate B.I.A. appeals.[355]

Although the proposal seems innocuous, it could generate serious problems. Aliens, having immigrated from foreign countries, frequently have occasion or even need to visit family members and others living outside the United States. A lawfully admitted permanent resident who has lived here more than seven years must know before leaving that there will be no problem returning. Residence, family, home, and livelihood can all be at stake. If an immigration officer at the local I.N.S. office or an anonymous decisionmaker at a "RAC"[356] erroneously denies the application, current regulations enable the B.I.A. to correct the error. Under the proposed amendment, the alien would have no way to test the correctness of the decision before leaving. The choice for the alien would be between risking everything that is dependent on continued residence and remaining within U.S. territory indefinitely.

Perhaps, if the proposal is adopted, the alien will be able to obtain judicial review of the immigration officer's decision. But there is no guarantee that a court would even permit review. An action for declaratory or injunctive relief might be held unavailable on the ground that the alien is essentially challenging in advance an exclusion order for which habeas corpus is the sole remedy.[357] Habeas, in turn, might be unavailable on the ground that the alien's liberty has not been sufficiently restricted.[358] And, even if judicial review is allowed, directing the alien along that route would defeat not only the stated efficiency goal of the amendment, but also the interests generally served by requirements of exhaustion of remedies.

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[352] 8 C.F.R. § 212.3 (1985).

[353] Id. § 3.1(b)(3).

[354] 50 Fed. Reg. 25994 (June 24, 1985).

[355] Id.

[356] See note 60 supra and accompanying text.

[357] I. & N. Act § 106(b), 8 U.S.C. § 1105a(b).

Nor is it clear that the proposal would significantly enhance even administrative efficiency. While the consequences to the individuals involved can be staggering for the reasons just discussed, the number of district director denials of 212(c) applications appealed to the B.I.A. is miniscule.[359] Moreover, when the B.I.A. does receive a second 212(c) appeal in the same case, it may invoke the principle of collateral estoppel if the issues are truly the same.[360]

The only other rationale offered in the proposed amendment is that the revision would bring the 212(c) procedure "into line with other applications such as asylum and adjustment of status."[361] The benefits of symmetry are not evident, however, and in any event the effect would also be to bring 212(c) procedure out of line with the procedure employed in one other category of discretionary waiver application.[362] On balance, the advantages of the proposed amendment seem insignificant, and the disadvantages seem serious.

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[358] 358. See note 299 supra.

[359] 359. The figures were felt to be too small to make separate bookkeeping worthwhile, but 212(c) cases and cases arising under sections 212(d)(3) (discussed below) together constitute only 1% of the B.I.A. caseload. See Appendix, infra.

[360] 360. As pointed out by G. Hurwitz, Counsel to the Director of the E.O.I.R., Interview with author (July 12, 1985), the mere passage of time can prevent the B.I.A. from assuming that the issues in the two appeals are the same. That will be true, for example, if the first denial was based on a finding that the alien had accumulated less than seven years of lawful domicile and enough time has elapsed to cure that defect, or if relief was denied in the exercise of discretion and the increased length of residence has improved the equities. The point is well taken, but not all 212(c) denials turn on length of time. Thus, the use of collateral estoppel can at least reduce the inefficiency.

[361] 361. 50 Fed. Reg. 25994 (June 24, 1985).

[362] 362. The B.I.A. has jurisdiction over district director denials of applications filed under I. & N. Act § 212(d)(3), 8 U.S.C. § 1182(d)(3), see 8 C.F.R. § 3.1(b)(6) (1985), even though those applications may also be renewed in subsequent exclusion proceedings, id. § 212.4(b), and thus reviewed again by the B.I.A., id. § 3.1(b)(1).

A separate question is which administrative and judicial forums are best suited for review of district director denials of applications filed under section 212(c) and other statutory waiver provisions. The current regulations list two categories of waiver denials appealable to the B.I.A. and four to the A.A.U.[363] As noted earlier, all are judicially reviewable in the district courts.

Certain characteristics are common to all these appeals. Volume at the administrative[364] level, and especially at the judicial[365] level, is low, a factor favoring collegial review. The rate at which district court decisions are appealed to the courts of appeals is close to zero,[366] a factor favoring district court review. Aliens seeking these waivers have no incentive to induce delay because they are either requesting admission or filing applications in advance of exclusion or deportation proceedings. Hence, the issues that are raised tend to be genuine, a factor favoring collegial review. The proceedings are not highly formalized,[367] but the record typically contains enough information to permit meaningful review.[368]

The major factors that tend to separate the various waiver provisions are the impact on the individuals and the nature of the issues. In the 212(c) cases discussed earlier, the potential impact is great. The provision operates only on long-term, lawfully admitted, permanent residents, and a denial can either foreclose return or confine a person's movement indefinitely. The provision generates some exceptionally difficult legal issues.[369] Both factors favor continuing B.I.A. review and shifting judicial review to the courts of appeals. That 212(c) applications are also adjudicated by immigration judges in exclusion and deportation proceedings is relevant too. The B.I.A. already reviews 212(c) decisions in both exclusion and deportation cases; the courts of appeals already do so in deportation cases, and it was recommended earlier that the courts of appeals be given jurisdiction over exclusion cases as well. There are several benefits in having the same tribunals decide the same issues.[370]

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[363] The cases presently appealable to the B.I.A. are those arising under I. & N. Act §§ 212(c) and 212(d)(3), 8 U.S.C. §§ 1182(c), 1182(d)(3). _See_ 8 C.F.R. § 3.1(b)(3, 6) (1985). Those appealable to the Associate Commissioner for Examinations, and therefore the A.A.U., arise under I. & N. Act §§ 212(a)(16, 17) (permission to reapply for admission after previous exclusion or deportation), 212(e, h, i), 8 U.S.C. §§ 1182(a)(16, 17), 1182(e, h, i). _See_ 8 C.F.R. §§ 103.1(f)(2)(v, vi, vii) (1985).

[364] The B.I.A. decided only 32 waiver cases in fiscal year 1984. _See_ Appendix, _infra_. The A.A.U. was more active, but even there only 191 cases were decided. _Id._

[365] Only 18 cases were filed in fiscal year 1984. _See_ Appendix, _infra_.

[366] The data are not broken down by type of waiver, but in FY 1984 only one district court waiver decision was appealed; that year, 18 waiver cases were decided by the district courts. _See_ Appendix, _infra_.

[367] _See_ _Gordon & Rosenfield_, note 8 _supra_, § 1.9e.

[368] In fiscal year 1984, the A.A.U. needed to remand only 1.6% of its waiver cases for further information. _See_ Appendix, _infra_. The B.I.A. does not develop that type of data.

As for judicial review, however, there are countervailing factors. One is the extremely low appeal rate noted above. Another is that the formality level might fall short of what would be demanded for direct court of appeals review. If courts of appeals prove to be slower than district courts, then the special need for prompt decisions in these cases will be a third countervailing consideration.

The other waiver case currently allocated to the B.I.A. is that arising under section 212(d)(3) of the Act. This provision permits discretionary waivers, for nonimmigrants, of almost any of the grounds of exclusion.[371] Since the aliens seek only temporary admission, the individual interests at stake will generally be at the lower end of the scale. Further, the issues almost invariably rest on discretionary considerations that possess little general applicability. There seems no compelling reason for these cases to command the resources of a collegial body. They should be transferred to the A.A.U.

In contrast, several of the waiver cases now assigned to the A.A.U. frequently implicate important interests and raise difficult issues suitable for collegial disposition. Under section 212(h) of the Act,[372] an alien who is inadmissible on certain criminal grounds may be admitted for permanent residence in the exercise of the Attorney General's discretion upon findings that the alien bears one of several specified close family relationships to an American citizen or permanent resident, that exclusion would cause "extreme hardship" to the American relative, and that admission would not endanger the national welfare. Section 212(i)[373] empowers the Attorney General to waive certain fraud-related exclusion grounds in the case of an intending immigrant who possesses one of several designated close family relationships to an American citizen or permanent resident. In each of these categories, the interests are potentially great. Permanent residence is sought, and a close family relationship is required. For section 212(h), the requirement of extreme hardship further intensifies the harm that would result from an erroneous denial. Moreover, both provisions have rough analogues in the deportation law,[374] and thus present issues similar to those resolved by the B.I.A. and the courts of appeals. All these factors favor transferring administrative review to the B.I.A. and judicial review to the courts of appeals. As to the latter, there are the same offsetting factors that arise in the 212(c) cases.

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[369] See Hing, The Ninth Circuit: No Place for Drug Offenders, 10 Golden Gate L. Rev. 1 (1980); Comment, Lawful Domicile under Section 212(c) of the Immigration and Nationality Act, 47 U. Chi. L. Rev. 771 (1980); Recent Development, Immigration -- Lawful Unrelinquished Domicile, 12 Vand. J. Transnat'l L. 1009 (1979).

[370] See § II.C.6 supra.

[371] 8 U.S.C. § 1182(d)(3). Certain ideological exclusions are the only exceptions. Id.

[372] 8 U.S.C. § 1182(h).

Aliens who have been ordered excluded must generally wait one year, and those ordered deported five years, before becoming eligible to reapply for admission. The Attorney General has the discretion, however, to waive those barriers.[375] Refusals to do so are presently appealable to the A.A.U.,[376] and that is where they should remain. The interests involved are not minimal, but on the scale of immigration cases they are relatively low. The effect of the denial is merely to delay reapplication for whatever is left of the one-year or five-year period. Further, the highly individualized discretionary determinations that the cases tend to require are unlikely to be precedential.

Finally, certain nonimmigrants admitted as exchange visitors must return home for two years before becoming eligible to apply for permanent residence or for immigrant or certain nonimmigrant visas.[377] Waivers of that requirement can be requested, and denials of such requests are appealable to the A.A.U.[378] Here again, a denial ordinarily has only a temporary impact, and the issues tend to be of a highly individualized, discretionary, nature. Clouding the forum question, however, is a statutory requirement of "exceptional hardship." The presence of that requirement means that an erroneous denial can be quite serious. Consequently, the potential impact might be great enough to justify B.I.A. review. The considerations that militate against court of appeals review remain present.

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[373] Id. § 1182(i).

[374] Compare I. & N. Act §§ 212(h, i), 8 U.S.C. §§ 1182(h, i) with id. §§ 244(a), 241(f), 8 U.S.C. §§ 1254(a), 1251(f), respectively.

[375] Id. § 212(a)(16, 17), 8 U.S.C. § 1182(a)(16, 17).

[376] 8 C.F.R. § 103.1(f)(2)(v) (1985).

[377] I & N. Act § 212(e), 8 U.S.C. § 1182(e).

[378] 8 C.F.R. § 103.1(f)(2)(vii) (1985).

Conclusions on the waiver cases are not all clear cut, but several changes are suggested: The 212(d)(3) cases should be shifted from the B.I.A. to the A.A.U.; the 212(h), 212(i), and two-year-foreign-residence-waiver cases should be transferred from the A.A.U. to the B.I.A.; and the other waivers that are administratively appealable should remain where they are. As for judicial review, the same factors are at work but, even in cases where they favor the courts of appeals, the low appeal rate and the lack of a formal record might be enough to even the score and dictate preservation of the status quo, review in the district courts. Much depends, however, on whether it is decided, as recommended earlier, to shift the exclusion cases to the courts of appeals. To avoid bifurcation, it might be beneficial to send waivers of inadmissibility to the same tribunals that decide the basic question of admissibility. Further, if it is decided to keep exclusion cases in the district courts, the balancing of values that that decision would probably reflect would itself suggest a similar decision for waiver cases.

3. Other Decisions Affecting Immigration Status

One subject of major importance today is asylum.[379] Aliens who are either within U.S. territory or at the U.S. border often seek relief from persecution at home. Two asylum provisions, with differing requirements and consequences, are presently in place. Under section 208 of the Act, an alien may apply to the district director for asylum if neither exclusion nor deportation proceedings have been instituted.[380] No administrative appeal is provided, but the application may be renewed before an immigration judge if exclusion or deportation proceedings are later begun.[381] The latter decision, being part of the exclusion or deportation order, is appealable to the B.I.A.[382] The availability of the renewal option has been held to bar judicial review of the district director's denial of an asylum application, on the theory that administrative remedies have not been exhausted.[383]

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[379] Asylum must be distinguished from the process by which refugees located in foreign countries apply for permission to enter the U.S. For discussion of the latter process, see, e.g., Aleinikoff & Martin, note 8 supra, ch. 8, § B; Gordon & Rosenfield, note 8 supra, at 2-183 to 2-188.16; Leibowitz, note 8 supra, ch. 4.

[380] 8 U.S.C. § 1158; 8 C.F.R. § 208.1 (1985).

[381] 8 C.F.R. §§ 208.8(c), 208.9 (1985).

[382] Id. § 3.1(b)(1, 2).

The other major asylum provision is section 243(h).[384] Under its terms, an alien in either exclusion or deportation proceedings may request the immigration judge not to return him or her to a country in which the alien's life or freedom would be threatened on any of several specified bases. That decision, also being part of the exclusion or deportation order, is also appealable to the B.I.A.[385] and therefore subject to the usual rules governing judicial review of exclusion and deportation orders.[386]

It is not possible to address the subject of asylum procedure in a meaningful way within the scope of this study, but there is now, fortunately, a vast literature that can be consulted.[387] The many complex issues raised by asylum procedure have been the subjects of volatile debate stimulated in part by recent legislative proposals.[388] A separate study aimed at cataloguing and evaluating the widely differing options that have been put forward thus far would be useful.

One last order affecting status is rescission of adjustment. Certain aliens who were admitted temporarily, but who subsequently satisfy both the quantitative and qualitative requirements for admission as permanent residents, may, in the discretion of the I.N.S., be granted "adjustment of status" to permanent residence.[389] If, within five years after status is adjusted, the Attorney General finds that the person was in fact ineligible for adjustment, the adjustment of status must be rescinded.[390] The decision whether to rescind adjustment has been delegated to immigration judges, who conduct evidentiary hearings.[391] Appeal is to the B.I.A.[392] Judicial review is in the district court.[393]

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[383] E.g., Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 765 (S.D.N.Y. 1978). But see the exceptions recognized in Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982); Hotel and Restaurant Employees Union, 563 F. Supp. 157, 161-62 (D.D.C. 1983).

[384] 8 U.S.C. § 1253(h).

[385] 8 C.F.R. § 3.1(b)(1, 2) (1985).

[386] I. & N. Act § 106, 8 U.S.C. §1105a.

[387] For a sampling, see Aleinikoff, Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States, 17 U. Mich. J. L. Reform 183 (1984); Anker & Posner, The Forty-Year Crisis: A Legislative History of the Refugee Act, 19 San Diego L. Rev. 9 (1981); Helton, Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. Mich. J. L. Reform 243 (1984); Kurzban, Restructuring the Asylum Process, 19 San Diego L. Rev. 91 (1981); Martin, The Refugee Act of 1980: Its Past and Future, 1982 Mich. Yearbook of Int'l Legal Studies 91; Scanlon, Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980, 56 Notre Dame Lawyer 618 (1981); Note, United States Asylum Procedure: Current Status and Proposals for Reform, 14 Cornell Int'l L.J. 405 (1981). For more general treatment, see, e.g., Aleinikoff & Martin, note 8 supra, ch. 8, § C; Gordon & Rosenfield, note 8 supra, § 2.24Af; Leibowitz, note 8 supra, ch. 5; Steel, note 8 supra, ch. 8.

[388] For a summary of the asylum adjudication provisions of the Senate version of the Simpson-Mazzoli bill, see Aleinikoff, note 387 supra, at 185-86 n.15.

The general forum selection factors point unambiguously toward maintaining B.I.A. review and transferring judicial review to the courts of appeals. The impact on the parties is formidable. No longer a permanent resident, the alien will lose the opportunity to apply for naturalization at the end of the five-year period,[394] as well as the capacity to bring his or her immediate family into the country.[395] Most important, the rescission ordinarily leads to deportation, since the original admission period will normally have expired by the time the rescission proceedings have been completed.[396]

Further, since the rescission hinges on whether the alien was eligible for adjustment, and since eligibility in turn depends on whether the alien was excludable, the legal issues tend to resemble those raised in exclusion cases. For similar reasons, they also parallel issues often surfacing in deportation cases.[397] As discussed earlier, both exclusion and deportation issues tend to lend themselves to collegial disposition. Moreover, the similarity of issues is itself a reason to have the same tribunals resolve deportation, exclusion, and rescission cases. Deportation and exclusion cases are already administratively appealable to the B.I.A., deportation cases are already judicially reviewable in the courts of appeals, and it was recommended earlier that exclusion cases be reviewable directly in the courts of appeals as well.

Another factor favoring B.I.A. and court of appeals review is the extremely low volume of rescission cases. The B.I.A. reviewed only 17 rescission orders in fiscal year 1984.[398] An exact count of court actions in rescission cases is not available, but it is known that the number is minute.[399]

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[389] I. & N. Act § 245, 8 U.S.C. § 1255.

[390] Id. § 246, 8 U.S.C. § 1256.

[391] 8 C.F.R. § 246 (1985).

[392] Id. §§ 3.1(b)(8), 246.7.

[393] I. & N. Act § 279, 8 U.S.C. § 1329.

[394] See id. § 316(a), 8 U.S.C. § 1427(a). If the applicant is married to an American citizen, the required period of permanent residence is only three years. Id. § 319, 8 U.S.C. § 1430.

[395] See id. § 203(a)(2), 8 U.S.C. § 1153(a)(2).

[396] The alien will become deportable under id. § 241(a)(2), 8 U.S.C. § 1251(a)(2), as having overstayed his or her visa.

[397] See notes 287-91 supra and accompanying text.

[398] Appendix, infra.

Because the rescission order is preceded by a formal evidentiary hearing, there would rarely be occasion for a reviewing tribunal to take additional evidence. As discussed earlier, that factor also favors B.I.A. and court of appeals review. Further, since the B.I.A. presently performs the task of administrative review, a reasoned written opinion will be available to assist the court of appeals further.

4. After Exclusion or Deportation

The previous discussion assumed an alien who was seeking independent review of a miscellaneous order. I shall now assume that the alien is also the subject of an exclusion or deportation order. The alien might wish review of both, either because the validity of the deportation order rests on that of the miscellaneous order, or because the miscellaneous order retains independent importance.

This new assumption introduces a wrinkle. In addition to all the other forum selection factors developed in section II and applied to the miscellaneous orders above, two additional factors now become relevant: jurisdictional confusion and bifurcation of cases. Those concerns have prompted several other writers to recommend, in different ways, that deportation orders and miscellaneous related orders be reviewed by the same courts.[400]

If the miscellaneous order was entered during the course of either exclusion or deportation proceedings, jurisdictional problems do not arise. At the administrative level, the B.I.A. has always assumed that its jurisdiction to review "[d]ecisions of special inquiry officers [immigration judges] in exclusion cases" and "in deportation cases"[401] extends to collateral decisions made during those proceedings.[402] At the judicial level, the Supreme Court has held squarely that the courts of appeals have jurisdiction to review all orders made during the course of deportation proceedings,[403] including denials of motions to reopen.[404] In each of those settings, the assertion of jurisdiction can be bolstered by characterizing the action as a challenge to the exclusion or deportation order itself. The ruling on the miscellaneous order is simply the ground on which the immigration judge or the B.I.A. is alleged to have erred in reaching the decision to order exclusion or deportation. The issue does not seem to have arisen in judicial review of exclusion orders, presumably because such review takes place in the district courts,[405] where the miscellaneous orders discussed here are already independently reviewable.[406]

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[399] The Office of Immigration Litigation compiles, within each of the major headings of case categories, a subheading entitled "other." The only major heading within which rescission cases would seem to fit is "Challenges to Denial of Benefits." Under this heading, the subheading for "Other" shows a total figure of 27. See Appendix, infra. Since even administrative appeals numbered only 17, it seems almost certain that the number of cases brought to court would be insignificant.

[400] See, e.g., Davis, note 199 supra, at 798-99; Friendly, note 131 supra, at 175-76; L. Jaffe, Judicial Control of Administrative Action 421-22 (1965); Roberts, Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, House of Reps., on H.R. 1510, The Immigration Reform and Control Act of 1983, 98th Cong., 1st Sess., at 955 (1983). But see Currie & Goodman, note 1 supra, at 31-36; Goodman, note 106 supra.

But suppose the miscellaneous order is made outside exclusion or deportation proceedings. An order rescinding adjustment of status might be followed by a deportation order. Or a deportation order might be followed by a denial of an application for a temporary stay of deportation. Or a visa petition or an application for an extension of stay might be denied before exclusion or deportation proceedings have been commenced, while they are pending, or after they have been concluded. In these and other cases, the question arises whether the miscellaneous order and the ultimate exclusion or deportation order should be reviewed in the same court. Those kinds of issues are already common in deportation cases[407] and will possibly arise in exclusion cases as well if, as recommended above, aliens are given the option of challenging exclusion orders in the courts of appeals.

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[401] 8 C.F.R. § 3.1(b)(1, 2) (1985).

[402] See, e.g., Matter of Duarte, 18 I. & N. Dec. 329 (1982)(reviewing 212(c) denial in exclusion proceedings); Matter of Lam, 18 I. & N. Dec. 15 (1981) (reviewing asylum denial in deportation proceedings); Matter of Herrera, 18 I. & N. Dec. 4 (1981) (reviewing denial of suspension of deportation in deportation proceedings); Matter of Silva, 16 I. & N. Dec. 26 (1976) (reviewing 212(c) denial in deportation proceedings); Matter of Fernandez, 14 I. & N. Dec. 24 (1972) (reviewing 212(h) denial in exclusion proceedings).

[403] Foti v. I.N.S., 375 U.S. 217 (1963); accord, Che-Li Shen v. I.N.S., 749 F.2d 1469, 1472 (10th Cir. 1984).

[404] Giova v. Rosenberg, 379 U.S. 18 (1964); accord, Chudshevid v. I.N.S., 641 F.2d 780, 784 (9th Cir. 1981).

[405] I. & N. Act § 106(b), 8 U.S.C. § 1105a(b).

[406] Id. § 279, 8 U.S.C. § 1329.

[407] See Aleinikoff & Martin, note 8 supra, ch. 7, § B; Gordon & Rosenfield, note 8 supra, § 8.9Ab.

The law is presently in flux. In 1968, the Supreme Court held in Cheng Fan Kwok v. I.N.S.[408] that the original jurisdiction of the courts of appeals in deportation cases is confined to orders actually entered in deportation proceedings and orders denying motions to reopen those proceedings. It left open, however, the possibility that a court of appeals could assert pendent jurisdiction over other discretionary orders when the court already has before it a petition for review of the deportation order.[409] At least one court of appeals accepted that invitation. It reviewed an order rescinding adjustment of status when the validity of the rescission order was crucial to that of the subsequent deportation order also before the court.[410] Other cases, in contrast, refused jurisdiction over miscellaneous I.N.S. orders entered either before[411] or after [412] the deportation orders that were the subjects of the petitions for review.

In 1983, however, the Supreme Court decided I.N.S. v. Chadha.[413] The Court held that the courts of appeals had jurisdiction to review the constitutionality of a one-House congressional veto on which a deportation order rested. Rather than invoke pendent jurisdiction, the Court used sweeping language recognizing court of appeals jurisdiction over "all matters on which the validity of the final [deportation] order is contingent, rather than only those determinations actually made at the hearing."[414]

Reconciling Chadha and Cheng Fan Kwok has proved difficult. The courts have struggled particularly with the meaning of the word "contingent." One court quoted language in Chadha that leaves unclear whether the Supreme Court had in mind (a) orders that "stand or fall on the validity" of the challenged order, or (b) orders that are "plainly inconsistent with the deportation order."[415] Other courts have held Chadha applicable to collateral orders raising legal questions[416] but not to those raising "factual" questions.[417]

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[408] 392 U.S. 206 (1968).

[409] Id. at 216 n.16.

[410] Bachelier v. I.N.S., 625 F.2d 902, 904 (9th Cir. 1980); accord, Ferrante v. I.N.S., 399 F.2d 98, 103 (6th Cir. 1968) (decided before Cheng Fan Kwok, though rehearing denied after Cheng); Waziri v. U.S. I.N.S., 392 F.2d 55 (9th Cir. 1968) (same). See also Kuh v. I.N.S., 758 F.2d 370, 371-72 (9th Cir. 1985) (dictum that court of appeals may review rescission order together with deportation order).

[411] E.g., Kavasji v. I.N.S., 675 F.2d 236 (7th Cir. 1982); Ghorbani v. I.N.S., 686 F.2d 784 (9th Cir. 1982).

[412] E.g., Yamada v. I.N.S., 384 F.2d 214 (9th Cir. 1967).

[413] 462 U.S. 919 (1983).

[414] Id. at 938, quoting the lower court opinion, 634 F.2d at 412.

This uncertainty is capable of generating wasteful jurisdictional litigation of the type just discussed. Currie and Goodman, writing long before the decision in Chadha, were able to suggest that the jurisdictional difficulties had been largely eliminated.[418] The contingent orders doctrine announced in Chadha prevents the same assertion today. The magnitude of the problem is not great enough to offset the arguments for retaining direct court of appeals review,[419] but the issues can be troublesome on occasion and, as discussed below, there are some possible legislative solutions that would be relatively cost-free.

Further problems can arise even in those cases where the law is clear. Since the deportation order is normally reviewable exclusively in the court of appeals, a rule that assigns review of a related order to the district court bifurcates what might essentially be a single case. That result will sometimes be disadvantageous, as discussed earlier.[420]

What should be the response to these problems of jurisdictional uncertainty and fragmentation of cases? One option is to do nothing. The courts, if left alone, would eventually work out the jurisdictional issues on a case-by-case basis. And the occasional inefficiency and delay that can attend the bifurcation of a case could be tolerated. Ad hoc resolution of the jurisdictional issues could take many years, however, and, as will be seen, the bifurcation problem can be fairly painlessly eliminated or at least reduced.

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[415] Ghaelian v. I.N.S., 717 F.2d 950, 952 (6th Cir. 1983). The court ultimately concluded that the particular decision being challenged satisfied neither test.

[416] See Adame-Hernandez v. I.N.S., 769 F.2d 1387 (9th Cir. 1985)(deciding legal sufficiency of alien's claim of selective deportation).

[417] In Mohammadi-Motlagh v. I.N.S., 727 F.2d 1450 (9th Cir. 1984), the court of appeals withheld review of the district director's denial of the alien student's pre-deportation request to transfer schools. It is not clear what additional fact-finding the court would have to have done, since the job of the court is to review the administrative record rather than to make its own findings of fact. See § II.C.5 supra. In Abedi-Tajrishi v. I.N.S., 752 F.2d 441 (9th Cir. 1985), where the alien's estoppel argument would have required findings not based on the administrative record, the court appears to be on firmer ground.

[418] Currie & Goodman, note 1 supra, at 35.

[419] See notes 238-51 supra and accompanying text.

[420] See § II.C.7 supra.

A second option is to place judicial review of all decisions made under the Immigration and Nationality Act in the same courts. Variants of that approach have been suggested by others.[421] Whether the district courts or the courts of appeals are designated as the exclusive reviewers, the benefit would be to virtually[422] eliminate both jurisdictional uncertainty and bifurcation of cases. The price would be the lost opportunity to tailor the attributes of a class of cases to the attributes of the forum. As discussed in section II, enhancing the fit optimizes the efficiency, the accuracy, the acceptability, and the consistency of the administrative process.

A third option is to take precisely the opposite tack. The approach would be to specify by statute all the orders that, when accompanied by exclusion or deportation orders, would be reviewable in the courts of appeals. In making those determinations, Congress would consider not only the interests in jurisdictional certainty and consolidation of cases, but also the general forum selection factors that affect the independent suitability of a class of cases for court of appeals review. That response is plausible, but it does have disadvantages. The list could be underinclusive, since, in the initial process of sifting through the mass of different miscellaneous orders, logical candidates for court of appeals review would be easy to overlook. More important, the list could quickly become outdated as subsequent changes either elsewhere in the statute or in the regulations render obsolete the many value judgments reflected in the statutory list. In addition, although permitting greater tailoring than would a scheme that sends all immigration cases to the same courts, this approach of identifying sub-categories of immigration cases would allow less tailoring than a forum selection process that considers the attributes of the individual case. It was assumed earlier that a categorical approach would be the only workable way in which to determine the proper forum for independent review of a miscellaneous order.[423] As discussion of the next option will show, however, consideration of the individual case is feasible when the question is whether a court should be empowered to review an order related to one already within its jurisdiction.

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[421] See, e.g., Davis, note 199 supra, at 798-99; Friendly, note 131 supra, at 175-76; Roberts, testimony before House subcomm., note 400 supra, at 955.

[422] Uncertainty would not be wholly eradicated, because issues might occasionally arise as to whether the authorization for a particular order is the Immigration and Nationality Act.

[423] See the concluding paragraph of section II, supra.

A fourth option, then, is pendent jurisdiction. A court with subject matter jurisdiction over one claim may, in its discretion, assert pendent jurisdiction over another claim "deriv[ing] from a common nucleus of operative fact."[424] The doctrine is ordinarily invoked to establish federal court jurisdiction over a state claim that is related to a federal claim over which the court has independent jurisdiction. It has also been applied, however, when a federal court with jurisdiction over one federal claim wishes to decide also a related federal claim for which there exists no independent source of jurisdiction.[425]

Several others have raised the possibility of pendent court of appeals jurisdiction over I.N.S. orders that are related to final deportation orders.[426] That suggestion is a worthy one; in fact, there is no reason not to extend the principle to exclusion cases and rescission cases if, as recommended above, they also become reviewable in the courts of appeals.

Use of pendent jurisdiction would have several advantages. Since the decision whether to assert jurisdiction would be discretionary, courts of appeals would be able to decide on a case-by-case basis whether, on balance, consolidation of the two related orders is beneficial. Instead of anyone having to predict whether cases of a particular class are *likely* to possess specified attributes, the courts will be able to ask whether a given case actually possesses those attributes. Thus, the attributes of the case can be matched with those of the forum far more precisely than would be possible under the categorical approaches of option 2 and 3. Moreover, there need be no concern, as there is in option 3, that a particular category of I.N.S. order was overlooked by Congress, or that changes in substantive rules or in administrative procedures will render obsolete a detailed statutory catalog of orders reviewable in the courts of appeals. There will be no less jurisdictional certainty than there is at present, since the alien will still be able to elect the safety of district court review of the collateral order if, in the particular case, that course is preferred. Finally, this procedure would speed some cases, and would not delay others, since it applies only when there is also a petition for review of the principal order. Thus, at least in the context of deportation, the alien will already have a stay of the principal order whether the court of appeals reviews the collateral order or not.

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[424] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[425] *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 402-05 (1970).

[426] At least two Supreme Court opinions have explicitly left that question open. *See* Cheng Fan Kwok v. I.N.S., 392 U.S. 206, 216 n.16 (1968); Foti v. I.N.S., 375 U.S. 217, 227 n.14 (1963). In Mohammadi-Motlagh v. I.N.S., 727 F.2d 1450, 1452 (9th Cir. 1984), the court read both its own opinion in *Chadha v. I.N.S.*, 634 F.2d 408 (1980), and the Supreme Court's opinion, 462 U.S. 919 (1983), as resting on pendent jurisdiction. Aleinikoff & Martin have observed, however, that neither *Chadha* decision ever invoked the principle of pendent jurisdiction. *See* note 8 *supra*, at 584. In fact, the Ninth Circuit opinion in *Chadha* expressly disavowed any reliance on pendent jurisdiction. 634 F.2d at 414 n.2. But the court in *Mohammadi-Motlagh* did assume that pendent jurisdiction was now available, though not when factual issues are presented. *See also* Martinez de Mendoza v. I.N.S., 567 F.2d 1222, 1224-25 & n.5 (1977) (argument that court could assert pendent jurisdiction is "persuasive," though not necessary to assert it here). For commentary suggesting pendent jurisdiction in the deportation context, *see* *Currie & Goodman*, note 1 *supra*, at 35 & n.127; *Va. L. Rev. Note*, note 106 *supra*, at 418-20.

Adoption of pendent jurisdiction could be accomplished by statute. Congress could simply provide that any alien who files a petition for review of an order of deportation, exclusion, or rescission, and who is aggrieved by any other administrative decision made under the Immigration and Nationality Act, may request the court of appeals to assert pendent jurisdiction over the latter. The court would have discretion whether to grant the request. If it declines to exercise jurisdiction over the collateral order, it could invoke the existing statutory provision authorizing transfer to the district court.[426A]

The statute could also provide that, if the alien has sought review of the principal order in the court of appeals and review of the collateral order in the district court, the Attorney General may apply to the court of appeals to consolidate the two cases in that court. Invocation of that procedure could speed the results by eliminating the need for two tiers of review of the collateral order. The disadvantage would be that, if the court of appeals denies the Attorney General's request, the effect will have been to delay the outcome of the district court decision. But the Attorney General will be able to factor in that possibility when deciding whether to request a transfer.

In assessing the suitability of a case for pendent jurisdiction, the courts of appeals would have several factors to consider. Among them are the general forum selection factors developed in section II. Chief among these might be whether judicial factfinding will be necessary. Another crucial factor will be the relationship of the two orders. If they turn on common questions of law or fact, bifurcation can

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[426A] 28 U.S.C. § 1631.

produce both inefficiency and inconsistency. If the decision whether to uphold one order will affect either the mootness or the merits of the other, again judicial efficiency might be served by consolidation.

D. Adjustments to B.I.A. Structure and Procedure

The preceding section recommended the transfer of several case categories from the A.A.U. to the B.I.A. In fiscal year 1984, the effect of these recommendations would have been to increase the B.I.A. caseload from 3131 to at least 4527.[427] Can the B.I.A. withstand that kind of assault?

1. Panel System

The five-member B.I.A. presently decides every case en banc.[428] In my opinion, a panel system is long overdue.[429] Panels are used by other administrative review boards and by the federal courts of appeals.[430] Frank

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[427] A.A.U. and B.I.A. data are not completely segregable by jurisdictional category. But the two major items that the previous discussion recommended transferring from the A.A.U. to the B.I.A. are the non-immigrant and immigrant preference petitions, for which the numbers of decided cases were 803 and 625, respectively. See Appendix, infra. Those transfers would have added 1428 cases. Also recommended for transfer were the fiancé(e) petitions, the orphan petitions, and the 212(h) and 212(i) waivers. For those categories, the numbers are unavailable but small. Interview with Weinig, note 84 supra. The B.I.A. has no separate figures for the 212(d)(3) cases, which this article recommends be transferred from the B.I.A. to the A.A.U. But even when those cases are combined with the 212(c) cases, the total is only 32. Thus, if the B.I.A. jurisdiction in FY 1984 had been what this article recommends, the minimum figure by which its caseload would have increased is 1428 less 32, or 1396.

[428] Interview with Holmes & Hurwitz, note 76 supra.

[429] The Administrative Conference has previously recommended that multi-member agencies consider delegating review powers to panels of their own members, particularly when the volume is great and there is no apparent means of reducing either the number or the significance of the policy issues those cases present. A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3, Rec. 3(c) (1985). The Conference recommendations were based on Cass, note 1 supra. The Conference was addressing only the subject of formal agency adjudication, but, as discussed below, its conclusion seems sound also for the many informal decisions the B.I.A. reviews.

[430] See, e.g., Strauss, note 160 supra, at 252 (Bureau of Land Appeals); 28 U.S.C. § 46 (courts of appeals).

Goodman specifically suggested in 1973 that the B.I.A. adopt a panel system,[431] and several congressional bills proposing a statutory body analogous to the B.I.A. have recently resurrected the idea.[432]

Breaking up into randomly selected three-member panels would stretch the Board's ability to decide large numbers of cases conscientiously. In theory, with some increase in the size of the support staff, the B.I.A. should be almost 5/3 as productive. In a given case, only three of the five members would review the record, the briefs and any bench memoranda prepared by staff; only three would hear oral argument;[433] only three would consult; and only three would have to review and, if necessary, alter the per curiam opinion drafted by the staff attorney. Even if the new productivity falls short of 5/3 in practice, the added efficiency would be substantial.

A panel system will become essential if, as recommended earlier, the Board's jurisdiction is expanded, or if case filings in existing jurisdictional categories increase significantly. But a panel system should be adopted even if the Board's total caseload remains constant. Under those conditions, a panel system would permit each member who is deciding a case to delve more deeply into the issues. Moreover, the reduction in personal caseloads should speed the processing time and thus dampen the incentive for frivolous appeals. In addition, their smaller caseloads would permit the Board members to draft greater numbers of publishable precedent decisions. The guidance that these decisions impart to the I.N.S., to the immigration judges, and to the immigration bar should hopefully stem further the number of cases in which appeal is necessary. All these benefits can be accomplished without sacrificing collegial deliberation. If anything, the reduced caseloads would be expected to increase the proportion of cases in which true collegial decisionmaking is possible.

To be sure, the practice of reviewing all cases en banc has advantages. Requiring all cases to be decided by the same group of people can enhance the coherent development of the law. Like the federal courts of appeals,[434] however, the Board could, and should, adopt a rule requiring panels to follow precedent. To overrule a previous decision, the Board would be required to go en banc.

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[431] See Goodman, note 10 supra, at 19-21.

[432] E.g., H.R. 3187, 99th Cong., 1st Sess., Aug. 1, 1985 (per Rep. McCollum); H.R. 30, 99th Cong., 1st Sess., Jan. 3, 1985 (per Rep. Roybal); H.R. 1510, 98th Cong., 1st Sess., Feb. 17, 1983 (per Rep. Mazzoli); S. 529, 98th Cong., 1st Sess., Feb. 17, 1983 (per Sen. Simpson).

[433] Oral argument is already consigned to three-member panels under current practice. See letter from W. Leiden, Exec. Director, Amer. Immigration Lawyers Assn., to M. Fowler, A.C.U.S. (Nov. 6, 1985), at 3.

A second objection to a panel system might be that the composition of the particular panel can affect the outcome of the case. That possibility is clearest when the panel is split, for the two B.I.A. members not serving on the panel might have sided with the dissenting panelist. Even when the panel is unanimous, it cannot be assumed that en banc consideration would have produced the same result. A member of a collegial body can influence a decision not only by voting, but also by persuading his or her colleagues. With a panel system, the two non-panel-members lose any opportunity to do so. It is difficult to satisfy that objection, except to note that decision by less than the full membership of an adjudicative tribunal is a well tolerated fact of our legal system. In the federal courts of appeals, cases are routinely decided by panels composed of even smaller proportions of the courts' membership. Indeed, the impact of judge selection is the most extreme at the trial level, where only one judge among many will decide the case.

These competing considerations can be largely accommodated by a panel system that permits en banc decision in selected cases. But which cases should qualify?

One possibility is to permit either party, whenever aggrieved by a panel decision, to petition for rehearing en banc. If such petitions became routine, however, the very purpose of a panel system would be undermined. Further, at least in deportation cases, a petition would be futile unless it triggered some kind of stay -- either a full stay pending the decision whether to rehear the case, or a temporary stay until the Board could decide whether to grant a full stay. The petition for rehearing would thus add another layer of review and another delay at a time when concerns over delays have prompted searches for ways in which to reduce the number of layers. If the panel decision is unanimous, as it normally is, then an additional consideration is that the chance of reversal will be minimal, at least if the size of the Board remains at five. One of the original panel members would have to undergo a change of mind in order for en banc review to alter the result.

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[434] Ford v. General Motors Corp., 656 F.2d 117, 119-20 (5th Cir. 1981); In re Jaylaw Drug, Inc., 621 F.2d 524, 527 (2d Cir. 1980); Timmreck v. United States, 577 F.2d 372, 376 n.15 (6th Cir. 1978), rev'd on other grounds, 441 U.S. 780 (1979). See also Fed. R. App. P., Rule 35(a).

If the panel is split, the aggrieved "individual"[435] should be permitted to petition for rehearing en banc, and the filing of the petition should automatically stay the panel's order until the Board either disposes finally of the case or dissolves the stay. Since split panels are so infrequent, the number of such petitions will be low. Further, the split demonstrates that the issue is a close one; the frivolous petition filed solely to achieve delay will therefore not be a problem. And the 2-1 vote means that the probability of the other two Board members changing the outcome of the case can no longer be dismissed as minimal.

The I.N.S. Commissioner and the Attorney General should be permitted to petition for rehearing en banc even when the panel decision is unanimous. Like the individual, they have interests in the outcome of the particular dispute. In addition, however, they have institutional interests in the prospective effect of the decision. Further, when the I.N.S. Commissioner or the Attorney General demonstrates a willingness to invest the resources that en banc review would require, the petitions can be assumed to reflect those officials' assessments that the issues are of sufficient institutional importance, and the probability of reversal sufficiently great, to warrant the investment.

Restricting en banc petitions to split panels when the aggrieved party is the individual, while imposing no comparable limitations on the government, might seem unfair. But the distinction is rationally based for the reasons just discussed. Moreover, the individual who is aggrieved by a panel decision has the remedy of judicial review.

Any member of the B.I.A. should also be permitted to request en banc review, even when the panel is unanimous. Like an appellate court, the Board has an institutional interest in maintaining the quality of its decisions. Further, because panel decisions would be binding on future panels, there would be no opportunity for the full Board to overrule a precedent favorable to the government unless Board members were authorized to request en banc consideration. Neither the I.N.S. nor the Attorney General is likely to petition for en banc review in such a case since the precedent favors their positions. The aggrieved individual, under the preceding recommendation, will be unable to do so because the binding precedent will produce a unanimous panel decision. Even if the panel, or for that matter the entire Board, wished to overrule the decision, the opportunity would not arise. In theory, without an amendment to the statute or regulations, a precedent favorable to the government would remain on the books forever. Allowing individual Board members to request en banc review would eliminate the problem.

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[435] In most cases, the "individual" will be the alien. In visa petition cases, however, the individual who is petitioning to classify the alien can be a United States citizen. See I.& N. Act §§ 201(b), 203(a)(1,4,5), 8 U.S.C. §§ 1151(b), 1153(a)(1,4,5). The Board also has jurisdiction over decisions imposing administrative fines on individuals and corporations that similarly might not be aliens.

One might assume that this last concern can be met through less drastic means. The panel could be authorized to refer the case to the full Board, before reaching a decision, whenever the panel concludes that the case is controlled by a precedent that the panel would like the Board to reexamine. I would favor such a rule because it would avoid the need for two sets of oral argument, two sets of briefs, and two opinions. But it should be adopted in addition to, not as a substitute for, a rule allowing an individual Board member to request en banc rehearing. If two of the three panelists favor retaining the old rule, the panel is unlikely to refer the case to the full Board. Without a rule allowing a single member[435A] to request en banc consideration, the Board would be powerless to overrule the precedent, even if a majority of its members--one panelist and two non-panelists--favor overruling.

There remains the question whether en banc review, once requested, should be automatic or at the discretion of the Board. There is little chance that that choice will affect the outcome of a case. If a majority of the Board believes the case does not deserve even reconsideration, mandatory reconsideration is unlikely to produce a reversal. I say unlikely rather than impossible, because a Board member who was originally unwilling even to reconsider might have changed his or her thinking in response to either oral argument or collegial deliberation. But the probability does seem low. The discretionary route is preferable nonetheless for reasons of administrative efficiency. If it is clear to the majority that as a practical matter a reversal will be nearly

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[435A] A middle position is also possible. A single panelist, rather than any individual Board member, could be authorized to request en banc consideration. The theory would be that, unless at least one panelist wants to overrule the old decision, en banc consideration by the five-member Board is likely to be futile. Again, however, one of the two non-panelists might change the thinking of one of the three panelists. Given the Board's strong institutional interest in the quality of its decisions, and given the conclusion below that en banc consideration should in any event require a majority vote of the full Board, there seems little to lose and a fair amount to gain by permitting even non-panelists to request en banc consideration.

impossible, refusing en banc review will save both individual and governmental resources.

One last objection to a panel system requires mention. During the course of the Administrative Conference proceedings from which this article originated, the Department of Justice resisted the adoption of a panel system on the ground that the en banc hearing a panel system would require in selected cases would be an additional layer of review and thus an additional vehicle for delay.[435B] The Department pressed its concern quite earnestly, but, with all due respect, I believe its objection overlooks one crucial fact: The number of cases in which en banc rehearing will be necessary is almost certainly minute. The aggrieved individuals, who the Department assumes will be the principal source of delay, would not be permitted even to request en banc rehearing unless the panel were split. The most recent bound volume of published B.I.A. opinions reveals two split decisions in the 2 1/2 - year period that the volume covers.[435C] The proportion of splits in unpublished decisions is similarly low.[435D] The numbers could, of course, rise or fall with changes in the composition of the Board, whose members vary in personality, in ideology, and in perceptions of their role. But the low numbers illustrate at least roughly how infrequently even the full Board tends to split. Presumably, splits within three-member panels would be even fewer. Finally, even if the panel does split, and the aggrieved individual requests rehearing, the rehearing still will not take place under the present proposal unless a majority of the Board's members vote to go en banc. To require all five Board members to decide all of the more than 3000 cases adjudicated by the Board each year, solely because the alternative would require en banc rehearing in so tiny a handful of cases, would be a grotesque example of the tail wagging the dog.

To summarize: The Board should have the discretion to review a panel decision en banc whenever en banc review is requested by the I.N.S. Commissioner, the Attorney General, any Board member, or, in the case of a split panel, the aggrieved individual.

[435B] Presentation of T. Kenneth Cribb, Counselor to the Attorney General, at meeting of Council of Administrative Conference of the United States (Nov. 26, 1985).

[435C] 18 Admin. Decisions under the Immigration and Nationality Laws of the United States (March 1981 to Sept. 1983). See Matter of Salim, 18 I. & N. Dec. 311, 317 (1982) (Vacca, concurring and dissenting); Matter of Lam, 18 I. & N. Dec. 15, 20 (1981) (Appleman, concurring and dissenting).

[435D] Telephone interview with David B. Holmes, Chief Attorney Examiner of B.I.A., Executive Office for Immigration Review (Dec. 10, 1985).

2. Expansion of the Membership

Adding more B.I.A. members will not enhance the Board's productivity if every case continues to be decided en banc. If the B.I.A. adopts a panel system, however, an additional response to the increased caseload could be to expand the size of the Board.[436] There is indeed, as noted earlier, a point at which a tribunal becomes too large to function collegially. But the B.I.A., with only five members, is far smaller than most federal courts of appeals. Impairment of collegiality is not an immediate danger.

Whether or not the Board's membership is enlarged, a significant case transfer would almost certainly require some increase in the size of the support staff. Even apart from clerical resources, additional staff attorneys will be needed to screen cases for possible summary decision, to make recommendations on oral argument, and to prepare bench memoranda and opinion drafts.

The chief cost of increasing either the membership or the support staff would be monetary. In assessing that cost, however, one consideration is that a case transfer of the magnitude contemplated here would permit a reduction in the staffing needs of the A.A.U. The tradeoff would not be dollar for dollar because, as discussed earlier,[437] the B.I.A. expends more resources per case than does the A.A.U. But some offsetting reduction in the size of the A.A.U. would be possible.

A final comment is that, instead of transferring cases from the A.A.U. to the B.I.A., it would be possible to change the character of the A.A.U. Lawyers, collegiality, publication of precedent, and higher pay could all be introduced. To choose that course, however, would be to create a second B.I.A. There would be no apparent benefit in having two such similar tribunals, and their two sets of published decisions might even conflict. The present scheme provides one high-powered tribunal to review cases of great importance to the parties, cases presenting legal issues and other issues of widespread impact, and cases that for still other reasons benefit from the attributes that make the B.I.A. what it is. A second, less expensive, tribunal is provided for cases that do not demand such resources. That scheme is rational in its structure. Altering the present jurisdiction will make the scheme rational in its operation.

E. The Attorney General and the B.I.A.

Created by the Attorney General's regulations, the Board of

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[436] *See* *Goodman*, note 10 *supra*, at 30-32.

[437] *See* note 158 *supra* and accompanying text.

Immigration Appeals is now located within the Justice Department's Executive Office for Immigration Review.[438] B.I.A. members serve at the pleasure of the Attorney General, who defines the Board's jurisdiction and retains the power to review its decisions.[439] Over the years, a steady chorus of commentators and officials have called for statutory recognition of the B.I.A.[440] Several legislators have recently introduced bills to convert the B.I.A. into a statutory "United States Immigration Board"[441] located within the Department of Justice.[442]

These proposals make relevant an examination of what the relationship between the Board and the Attorney General ought to be. Should the Board be statutorily based? Should it be part of the Justice Department? Who should name, and who should be empowered to remove, its members? Who should define the Board's jurisdiction? Should its decisions be subject to review by the Attorney General?

All these questions require judgments as to the desirable level of B.I.A. independence. Those judgments, in turn, are driven by general personal preferences for either the political or the judicial model of agency decisionmaking;[443] by perceptions about the kinds of issues with which the B.I.A. is likely to be confronted; and, most importantly, by the specific aspect of independence that is being debated. Subject to those generalizations, several observations can be made.

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[438] See generally notes 73-82 supra and accompanying text.

[439] See 8 C.F.R. §§ 3.1-3.8 (1985), esp. §§ 3.1(b, h); see also United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 269-70 (1954)(Jackson, J., dissenting).

[440] E.g., Gordon, The Need to Modernize our Immigration Laws, 13 San Diego L. Rev. 1, 27 (1975); Milhollan (Chair of B.I.A. and now also Director of E.O.I.R.), comments reproduced in Levinson, note 55 supra, at 650; Orlow, Comments on "A Specialized Statutory Immigration Court", 18 San Diego L. Rev. 47, 50-51 (1980); Roberts, note 73 supra, at 29; Wildes, The Need for a Specialized Immigration Court: A Practical Response, 18 San Diego L. Rev. 53, 62 (1980); Report of the President's Comm'n on Immigration and Naturalization, Whom We Shall Welcome, at 160 (1953). In addition, several have proposed a statutory, article I, immigration court. See § IV infra.

[441] Why change the name? Adding the phrase "United States" is unnecessary, and dropping the word "Appeals" obscures the exclusively appellate nature of the Board's jurisdiction.

[442] E.g., H.R. 30, 99th Cong., 1st Sess., Jan. 3, 1985 (per Rep. Roybal); H.R. 1510, 98th Cong., 1st Sess., Feb. 17, 1983 (per Rep. Mazzoli); S. 529, 98th Cong., 1st Sess., Feb. 17, 1983 (per Sen. Simpson). See also section IV, infra (proposals for specialized immigration court).

[443] See note 160 supra; text accompanying note 175 supra.

1. Should the Board be a statutory body?

One argument sometimes advanced for according statutory recognition to the B.I.A. is that, since its continued existence is at the unfettered discretion of the Attorney General, the Board must operate under a perpetual fear of executive intervention.[444] Depending on the precise form such intervention is expected to take -- dissolution of the Board, removal of particular members, narrowing of jurisdiction, or reversal of individual decisions -- a statute might be enacted to eliminate the threat.

But even if it is assumed that those kinds of apprehensions truly affect B.I.A. decisionmaking, not all would agree that the influences are negative. Those who generally favor political models of agency decisionmaking might welcome political intrusion as a way of improving the coherence of agency policy. Further, as noted above, views as to the propriety of executive intervention depend on perceptions about the types of issues the cases tend to present. The more widespread the impact and the more pronounced the policy components are perceived to be, the more likely a person is to favor maximum Attorney General control.

Other arguments for statutory recognition seem more compelling. It has generally been assumed that a statutory Board would possess upgraded stature and therefore would command greater prestige.[445] If that assumption is correct, then the improved stature, combined with the heightened security of statutory moorings, would make membership on the Board more attractive. In addition, statutory recognition might enhance the appearance of independence.[446] It might even strengthen the Board's capacity to compete for resources[447] that others believe the Board sorely needs.[448]

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[444] See, e.g., President's Comm'n, note 440 supra, at 160-61; Levinson, note 55 supra, at 650; cf. Final Report, Select Comm'n on Immigration and Refugee Policy [hereafter S.C.I.R.P. FINAL REPORT], U.S. Immigration Policy and the National Interest, at 246 (March 1, 1981) (some commissioners recommend statutory creation of U.S. Immigration Board; majority would go further by establishing statutory, article I, immigration court).

[445] Gordon, note 440 supra, at 27; Levinson, note 55 supra, at 650; Roberts, note 73 supra, at 44 (especially if scheme requires Presidentisl appointment and Senate confirmation).

[446] S.C.I.R.P. Final Report, note 444 supra, at 246; Gordon, note 440 supra, at 27; Verkuil, note 9 supra, at 1196-97.

A final benefit of statutory recognition would be to eliminate an unnecessary problem. The present B.I.A., being a creature of administrative regulations, has held itself powerless to address aliens' claims that the Attorney General's regulations exceed the authority conferred by the enabling statutes.[449] That conclusion is not inevitable. The Board is subordinate to the Attorney General, but it is also subordinate to Congress. If the Board finds a conflict between the regulations and the statute, and the conflict affects the validity of an order that the Board has jurisdiction to review, then a case can be made for permitting the Board to hold the statute violated. In any event, the objection would disappear entirely if the Board were a statutory body.[450]

The only apparent disadvantage of making the Board statutory is that the Attorney General would lose the flexibility to dissolve the Board if he or she concluded that a different type of body could perform the review function more effectively.[451] In the present context, however, that type of flexibility seems unimportant. The Board is now so well entrenched[452] that the likelihood of the Attorney General dismantling it is remote. Further, a statute recognizing the Board could quite easily leave the Attorney General with broad discretion to make decisions concerning personnel, jurisdiction, and even the merits of individual cases. Those options can now be considered.

2. Should a statutory B.I.A. remain within the Justice Department?

The B.I.A. is now, and always has been, independent of the

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[447] Roberts, note 73 supra, at 30.

[448] Id. at 39-41; S.C.I.R.P. Final Report, note 444 supra, at 250.

[449] Matter of Bilbao-Bastida, 11 I. & N. Dec. 615, 616, 617 (B.I.A. 1966); Matter of Tzimas, 10 I. & N. Dec. 101, 102 (1962).

[450] The Board is also not permitted to address constitutional claims. See, e.g., Dastmalchi v. I.N.S., 660 F.2d 880, 886 (3d Cir. 1981); Chadha v. I.N.S., 634 F.2d 408, 414 (9th Cir. 1980), aff'd on other grounds, 462 U.S. 919 (1983); Matter of Cortez, 16 I. & N. Dec. 289, 291 n.2 (B.I.A. 1977); Matter of Lennon, 15 I. & N. Dec. 9, 27 (B.I.A. 1974). Codifying the B.I.A. would not alter that principle.

[451] The Administrative Conference generally favors allowing the agency head to prescribe the form of administrative review. A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3, Rec. No. 1(a) (1985).

[452] See Roberts, note 73 supra, at 30.

I.N.S.[453] That independence is crucial to both the reality and the perception of fairness, since the I.N.S. is one of the two adversarial parties appearing before the Board in a given case. Proposals to alter that relationship have not been advanced.

The question presented here, however, is whether the B.I.A., like the I.N.S., should remain within the Department of Justice. Some commentators have argued that it should not.[454] Making the B.I.A. independent of the Justice Department would render it more analogous to an article I court.[455] The resulting tribunal would also be analogous to Great Britain's Immigration Appeal Tribunal, which is independent of the Home Office.[456] And, in other substantive areas, Congress has created appellate tribunals outside the Departments whose decisions they review.[457] Thus far, however, except for one proposal for an article I court, the recent bills introduced in Congress would all keep the B.I.A. within the Justice Department.[458]

Like the other issues concerned with B.I.A. independence, this question is heavily influenced by general philosophies as to the proper degree of political control over administrative tribunals. But the analysis turns principally on precisely what powers the Attorney General will have if the B.I.A. remains where it is. I conclude below that the Attorney General should retain the powers to define the Board's jurisdiction and to review its decisions. If those powers are preserved, then the Board should remain within the Department of Justice. If they are not, then there is no reason to keep the Board in that Department.

3. Who should name the members of the Board, and who, if anyone, should have the power to remove them?

Two major views on who should appoint the members of a statutory B.I.A. have recently emerged. One position is that

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[453] See id. at 29-30.

[454] Orlow, note 440 supra, at 50-51; Wildes, note 440 supra, at 62.

[455] See section IV infra.

[456] Immigration Act 1971, §§ 12-23.

[457] Examples are the Occupational Safety and Health Review Commission, 29 U.S.C. § 661, and the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823. See Cass, note 1 supra, at 123 n.37; Levinson, note 55 supra, at 649 n.39.

[458] See the bills cited in note 432 supra.

B.I.A. members should be appointed by the President and confirmed by the Senate.[459] The B.I.A. would then occupy a position much like that of the U.S. Parole Commission.[460] Others prefer the current practice of Attorney General nominations.[461]

Since the President would presumably consult the Attorney General before naming a member of the B.I.A., it has been asked what would be gained by switching to a system of Presidential nominations.[462] Perhaps the most significant gain would be the process of Senate confirmation, a safety feature to which one experienced commentator attaches substantial importance.[463] Further, the combination of Presidential nomination and Senate consent might help to elevate the stature of the positions. Finally, one of the reasons commonly advanced for strict political control over the immigration process is that individual immigration decisions frequently require foreign policy judgments. The extent of the connection is sometimes exaggerated,[464] but those who view the foreign affairs element as prominent might prefer that appointments be made by the President, who can select a person with a compatible perspective on matters of foreign policy.

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[459] That approach has been urged by *Roberts*, note 73 *supra*, at 44, who now recommends the more sweeping remedy of an article I court. *See Roberts*, note 55 *supra*; *see also* section IV *infra*. The American Immigration Lawyers Association also favors a Board whose members are independent of the Attorney General. *See Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary, House of Reps., and Subcomm. on Immigration and Refugee Policy of the Comm. on the Judiciary, U.S. Senate*, 97th Cong., 2d Sess., on H.R. 5872, S. 2222, Immigration Reform and Control Act of 1982, at 687 (April 20, 1982). At least two bills have proposed a system of Presidential nomination and Senate confirmation. *See* the Mazzoli and Roybal bills cited in note 432 *supra*.

[460] The comparison is more fully developed by Levinson, note 55 *supra*, at 650-51.

[461] Not surprisingly, official statements of the Attorney General and the I.N.S. Commissioner reflect this position. *See Joint Hearings*, note 459 *supra*, at 324, 329, 340-41 (statement of Hon. W.F. Smith), 399 (statement of Hon. A. Nelson). The *Simpson* bill, note 432 *supra*, proposed continuation of Attorney General nominations.

[462] *Verkuil*, note 9 *supra*, at 1196 n.324.

[463] *Roberts*, note 467 *supra*, at 44.

[464] *See* the discussion of this point in *Legomsky*, note 266 *supra*, at 261-69.

There are advantages to a system of Attorney General nominations as well. Without the need for Presidential and Senatorial action, the process of installing new members could most likely be performed more quickly. In addition, even if the Attorney General retains the power to review decisions of the Board, practical time constraints assure that the vast majority of B.I.A. decisions will be administratively final. As noted earlier, many Board decisions require the exercise of discretion and, therefore, the making of policy. Thus, the Attorney General has a legitimate interest in choosing personnel who share his or her philosophical views on immigration, and whose policy decisions are likely to blend coherently with those implemented at the political levels. The response to this argument might be that the President has an analogous interest, though in any event it seems doubtful that an Attorney General would nominate individuals whom the President finds objectionable.

The balance is a close one, but the Presidential route is recommended. The additional stature created by that process and the additional safeguard of Senate confirmation are significant advantages. The benefits of Attorney General control can be attained in substantial part by other features described below.

The other side of the coin is removal from office. Tenure options range widely. Possibilities include life tenure, fixed renewable terms, and service at will. Either of the first two options would almost certainly provide for removal for cause.[465] The advantage of permitting removal at will is the same as that of Attorney General nominations: It would enable the Attorney General to conform the membership of the Board to his or her policy preferences. This is an important advantage, but I believe that the advantages of providing a high degree of security would be greater. Security enhances the attractiveness of the positions. It bolsters the integrity of the adjudicative process by eliminating influences extraneous to findings of descriptive fact and, at least in some cases, irrelevant to interpretations of statutes or administrative regulations. Security should also improve the public perception of fair procedure. Finally, making membership independent of one particular administration maintains the continuity of interpretation from one administration to the next.

This article, therefore, recommends a middle ground. The B.I.A. should remain within the Department of Justice, but its members should be appointed by the President subject to Senate confirmation, and they should enjoy a high level of job security.[466]

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[465] The bills cited in note 432 *supra* all provide for fixed terms and removal only for cause.

4. Who should define the jurisdiction of the B.I.A.?

Several options are possible. The statute could enumerate all the categories of B.I.A. jurisdiction. Or the statute could authorize the Attorney General to specify the Board's jurisdiction. An intermediate option, which I recommend, is for Congress to specify certain non-exclusive categories of B.I.A. jurisdiction and to authorize the Attorney General to expand the Board's jurisdiction by regulation.[467]

That approach would accommodate several competing interests. For reasons developed earlier, certain of the decisions already appealable to the B.I.A. seem so clearly suited to B.I.A. disposition that statutory codification appears sensible. Orders of deportation, exclusion, and rescission fit that description. The enormous potential impact on the parties, the prevalence of complex legal issues, the similarity of the issues among these three types of proceedings, and the formality of the initial hearings all favor continuing B.I.A. jurisdiction.

At the same time, there is much to commend the view that Congress should not ordinarily prescribe highly detailed review structures.[468] Agency heads will generally be best able to allocate appellate responsibilities within their own agencies. Flexibility will be particularly important if the jurisdictional changes recommended here are adopted. Many of those changes would represent significant departures from past practice. Implementation might well reveal the need for future adjustments, especially if the volumes of particular case categories change unexpectedly. Conferring on the Attorney General the power to alter the Board's jurisdiction over cases not specified in the statute would be faster and more workable than the lengthy process of amending the statute.[469]

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[466] Precisely what form job security should take is another question. In theory, the Attorney General may presently dismiss a Board member at will, but in practice no Board member has ever been removed involuntarily. If a system of fixed terms were adopted, the fear that a term will not be renewed might be a greater threat to independence than the present theoretical possibility of removal.

[467] That option has been suggested by I.N.S. Commissioner Alan Nelson. See Joint Hearings, note 459 supra, at 247.

[468] See A.C.U.S. Rec. 83-3, Rec. 1(a), 1 C.F.R. § 305.83-3 (1985).

[469] Cf. Freedman, note 148 supra, at 560 (F.C.C. expanded jurisdiction of its review board to reflect performance and changing circumstances).

There is, admittedly, a danger in the recommended course. If the preceding recommendations concerning statutory codification and Presidential appointments are adopted, the Attorney General would have less control over the B.I.A. than over the A.A.U. The Attorney General might thus have an incentive to assign to the A.A.U. case categories whose attributes would otherwise favor B.I.A. review. Diminishing but not eliminating this incentive is the recommendation below that the Attorney General retain the power to review individual B.I.A. decisions. That subject can now be addressed.

5. Should the Attorney General retain the power to review decisions of the B.I.A.?

At present, the Attorney General has the power, rarely exercised, to review any decision rendered by the B.I.A.[470] The principal purpose of Secretarial review is to facilitate the coherent formulation of agency policy.[471]

There are, it is true, other devices by which an agency head might avoid the fragmentation of departmental policy. When a review board makes a significant policy decision with which the agency head disagrees, one possible response would be to supersede the decision, at least prospectively, through rulemaking. Various hybrid procedures, suggested elsewhere, also offer promise.[472] It might be that those alternatives to agency head review should be employed more frequently, but, at least in the immigration context, Attorney General review should be retained nonetheless. The Board is often required to apply to individual fact situations such broadly worded statutory expressions as "extreme hardship" or "good moral character," or "moral turpitude."[473] In determining whether given primary facts satisfy those definitions, the Board cannot help but make policy judgments. For reasons given earlier,[474] those judgments might well be of a precedential nature. Yet, despite the potentially widespread impact, embodying the holding in a generalized form suitable for an administrative regulation might be impossible.

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[470] 8 C.F.R. § 3.1(h) (1985). Attorney General review can be initiated by the Attorney General, the Chair or a majority of the Board, or the Commissioner of the I.N.S. Id.

[471] See generally Strauss, note 160 supra, at 253-64; text accompanying note 175 supra. For precisely that reason, the Administrative Conference has generally favored the retention, by agency heads, of the power to review the decisions of intermediate review boards. See A.C.U.S. Rec. 68-6, Recs. 1, 2(a), 1 C.F.R. § 305.68-6 (1985); cf. A.C.U.S. Rec. 83-3, Rec. 1(b)(ii), 1 C.F.R. § 305.83-3 (1985) (Congress should authorize agency heads to retain authority to review decisions of review boards). See also 5 U.S.C. § 557(b) (Secretary may review A.L.J. decisions).

[472] See especially Strauss, note 160 supra, at 262-64.

[473] See, e.g., I. & N. Act §§ 212(a)(9), 241(a)(4), 244(a, e), 8 U.S.C. §§ 1182(a)(9), 1251(a)(4), 1254(a, e).

Another alternative to Attorney General review is simply to authorize the Attorney General to do precisely what the alien may do when aggrieved by a B.I.A. decision: go to court. But if the B.I.A. decision required the exercise of discretion, as it would in the examples just given, judicial review will not solve the problem. Unless the court finds an abuse of discretion, the Board's decision will stand. When the issue is one on which reasonable minds might disagree, the ultimate result will still be a fracturing of the power to formulate agency policy.

In cases not presenting policy issues, Attorney General review might be unnecessary or even inappropriate. Questions of descriptive fact seem ideally suited to the judicial model of decisionmaking. The Attorney General's need to promote uniform policy has no application in those cases.

The same might be said of cases in which the Board is interpreting statutory provisions couched in highly specific language. Separating law from policy is never easy, but, the more refined the statutory language, the less room there is for the application of personal values. For those questions, the judicial model might also be preferable.

The same considerations would seem to apply when the issue is the interpretation of the administrative regulations, but in those cases there is an additional twist. Now the Attorney General is seeking only to interpret his or her own past pronouncements of policy. In theory, the Attorney General should be the best judge of their meanings. One answer might be that the regulations are not necessarily those of the incumbent; they might have been issued by a predecessor. Still, the Attorney General's staff might have internal documents or even a current staff member who was present when the disputed regulation was issued. A better answer would be that the Attorney General's subjective intent should not be controlling even if it can be conclusively ascertained. Individuals should, consistently with the principle of the rule of law, be able to rely on objective interpretations of the laws that govern their behavior.

Thus, although some issues demand the availability of Attorney General review, others do not. Further, Attorney General review has some affirmative costs. Peter Levinson has argued, among other things, that Attorney General review detracts from the appearance of independence, reduces the general stature of the Board, and "reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body."[475] It might also be argued that the Attorney General lacks the specialized expertise of the Board, although his or her staff, which will ordinarily perform the review function in practice,[476] can supply some of the necessary knowledge.

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[474] That can occur either because the fact situation is common or because the decision has a potential a fortiori effect. See note 174 supra and accompanying text.

Reconciling these competing concerns is troublesome. One approach would be to provide by statute that the Attorney General may review B.I.A. decisions on questions of policy, but not on questions of law or fact. But it is not difficult to imagine the jurisdictional skirmishes that such a separation would set off.[477]

My own conclusion is that the best approach, though not an ideal solution, is to codify the status quo. A statute recognizing the B.I.A. should authorize the Attorney General to review any B.I.A. decision. The Administrative Conference has recommended for purposes of efficiency that the power of Secretarial review be exercised sparingly,[478] and past practice makes it a safe bet that that advice will be heeded. This power is capable of being used improperly, but the ultimate safeguards include not only the good faith of the Attorney General but also the availability of judicial review.

The structure that would result from the recommendations made in this section is a mixed bag. It would embody certain features of what is commonly perceived as "independence," but would exclude others. I am not concerned about the strangeness of that product, because I do not regard independence as an all-or-nothing proposition. But I do admit to having less than complete confidence in my conclusion that the B.I.A. should remain within the Department of justice. Certainly, there are strong arguments on both sides of that question. Moreover, my personal biases tend to favor a judicial model of agency decisionmaking and a high priority on protection of the individual interests at stake in immigration cases by a body both actually and perceptibly insulated from political pressures. In addition, the analysis here is premised on the assumption that the orders over which the B.I.A. has jurisdiction all originate in the Justice Department. It might some day be decided, however, to provide for administrative review of State Department consular officers' decisions denying visa applications.[478A] If so, the B.I.A. might well be the ideal forum. And in that event, independence from the Justice Department might be found desirable or even necessary. But, at least until that happens, I tentatively conclude that the benefits of permitting the Attorney General to adjust the Board's jurisdiction and to review its decisions in exceptional cases are great enough to warrant keeping the B.I.A. within the Department of Justice.

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[475] Levinson, note 55 supra, at 650. He also argues that a law enforcement official should not preside over a quasi-judicial proceeding. Id. That argument hinges on whether one in fact views the proceeding as quasi-judicial, rather than political.

[476] Cf. Gladstone, note 160 supra, at 238-39 (review by F.C.C.).

[477] See Freedman, note 148 supra, at 563-64.

[478] A.C.U.S. Rec. 83-3, Rec. 2(b), 1 C.F.R. § 305.83-3 (1985).

F. Adjustments to Jurisdiction of Courts

Certain of the recommendations made in preceding sections would require statutory changes. These include clarification of the habeas corpus provisions applicable to deportation and exclusion; creation of concurrent district court and court of appeals jurisdiction over exclusion orders; and adoption of exclusive court of appeals jurisdiction over rescission orders. Pendent court of appeals jurisdiction over other immigration decisions related to exclusion or deportation could also be accomplished legislatively, although that reform could be effected judicially as well.

Apart from those changes, Congress should remedy two problems associated with section 279 of the Act. That section bestows on the district courts "jurisdiction of all causes, civil and criminal, arising under any of the provisions of *this title*."[479] The highlighted phrase refers to Title II of the Immigration and Nationality Act, which encompasses almost all the important immigration-related decisions.[480]

Occasionally, however, an administrative decision is made either under one of the other titles or under regulations authorized by one of the other titles. In those cases, section 279 is unavailable[481] and the alien must resort to "non-statutory" review by invoking general federal question jurisdiction.[482] But the latter, in turn, is subject to specific

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[478A] *See* note 72 *supra*.

[479] 8 U.S.C. § 1329 (emphasis added).

[480] *See* note 118 and accompanying text.

[481] Ubiera v. Bell, 463 F. Supp. 181, 184 (S.D.N.Y. 1978); Chen Chaun-Fa v. Kiley, 459 F. Supp. 762 (S.D.N.Y. 1978).

[482] 28 U.S.C. § 1331. When an agency action is not made reviewable by some specific substantive regulatory statute, an aggrieved party may seek "non-statutory" review in district court. The term "non-statutory" is commonly used, but it is misleading because there is in fact a statutory basis: Section 1331 *supra* provides jurisdiction, and the A.P.A., 5 U.S.C. § 703, provides a right of action. *See* W. Gellhorn, C. Byse & P.

preclusion statutes.[483] Whether section 279 has such preclusive effect is not presently clear, as discussed carefully elsewhere.[484]

When section 279 was enacted, general federal question jurisdiction required a minimum amount in controversy.[485] Under those circumstances, section 279 conferred a jurisdiction that might not otherwise have existed. Now that the requirement of an amount in controversy has been eliminated,[486] section 279 does not confer any civil jurisdiction beyond that already provided generally for federal questions: Every question arising under title II of the Immigration and Nationality Act is by definition a federal question. And jurisdiction over criminal cases is already granted by another statutory provision.[487] The only remaining effect of section 279 is to raise issues as to whether the section implicitly precludes review of immigration decisions that cannot be tied to Title II of the Act. No reason to preclude such review being apparent, section 279 should be repealed.[488]

A second potential difficulty with section 279 is that, if literally interpreted, it would extend to exclusion and deportation orders. At least one court has held that Congress intended to make section 279 subject to the more specific provision for exclusive review of deportation orders in the courts of appeals.[489] A contrary holding would destroy any significance that the exclusivity clause would otherwise have.

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482. (continued) Strauss, Administrative Law Cases and Comments 917 (7th ed. 1979). See also Chrysler Corp. v. Brown, 441 U.S. 281, 288 (1979); Hameetman v. City of Chicago, 776 F.2d 636, 640 (7th Cir. 1985).

[483] See 4 Davis, note 131 supra, at 128-29.

[484] Aleinikoff & Martin, note 8 supra, ch. 7, § C.

[485] Section 279 was part of the original Immigration and Nationality Act, passed in 1952. See Act of June 27, 1952, 66 Stat. 163. Elimination of the amount-in-controversy requirement for general federal question jurisdiction, 28 U.S.C. § 1331, did not begin to occur until 1976, and was not complete until 1980. See note 486 infra.

[486] See Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976) (requirement eliminated for actions against federal government or official); Pub. L. 96-486, § 2(a), 94 Stat. 2369 (1980) (requirement eliminated for all cases presenting federal questions).

[487] 18 U.S.C. § 3231.

[488] An alternative response would be to amend section 279 by changing the phrase "this title" to "this Act." So worded, however, section 279 would add nothing to general federal question jurisdiction.

[489] Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981).

Presumably, an analogous result would be reached if an alien were to invoke section 279 to seek review of an exclusion order. Repeal of section 279 would eliminate these issues as well. If the section is retained, however, it should be amended to provide explicitly that it is subject to the specific provisions for review of deportation and exclusion.[490] The amendment should also extend to rescission orders if, as recommended earlier, they are transferred to the courts of appeals.

IV

A Specialized Immigration Court

Up to now, I have made three assumptions: Immigration judges and district directors make, and should continue to make, all the initial Justice Department adjudicative decisions in immigration matters. All administrative appeals lie, and should lie, in either the B.I.A. or the A.A.U. And all judicial review is, and should be, in the courts of general jurisdiction.

Several recent proposals, varying only slightly, would alter that broad adjudication structure. They would replace the immigration judges, the B.I.A., and the courts of general jurisdiction with a single court specializing in immigration.[491] To the extent that the proposals would substitute specialized trial judges for the present corps of immigration judges, evaluation is beyond the scope of this article, although at least one overriding practical problem should be noted.[492] The substitution of specialized appellate judges for the B.I.A. and the general courts of appeals does, however, raise questions relevant here.

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[490] 490. Some of the recent legislative proposals have included such a provision. See, e.g., the bills introduced by Rep. McCollum, Rep. Mazzoli, and Senator Simpson, note 432 supra.

[491] 491. The leading proponents have been Peter Levinson, note 55 supra, and Maurice Roberts, note 55 supra. Accord, S.C.I.R.P., Final Report, note 444 supra, § VII.C; Fuchs, The Search for a Sound Immigration Policy: A Personal View, in N. Glazer (ed.), Clamor at the Gates: The New American Immigration, at 17, 44-45 (1985); H.R. 5649, 97th Cong., 2d Sess., March 1, 1982, per Rep. McCollum, reintroduced in modified form as H.R. 3187, 99th Cong., 1st Sess., Aug. 1, 1985, per Rep. McCollum (adding provision authorizing petition for certiorari to U.S. Court of Appeals for the Federal Circuit).

[492] 492. If the trial division of the proposed specialized court is to be staffed by individuals of the same rank as the present immigration judges, and if it uses equivalent procedures, then the substitution would probably have little effect. But if the new judges are to be of higher rank, or if the procedure is to resemble more closely that used in the general courts, then adjudication will become more expensive per case. The volumes make this consideration critically

One alternative would be to replace the B.I.A. with a specialized, article I, appellate court but to leave intact the role played by the courts of general jurisdiction. Under that approach, the resulting specialized "court" would resemble an administrative tribunal independent of the Justice Department. Since the pros and cons of that arrangement have already been discussed,[493] the analysis that follows will assume that the appellate division of any specialized immigration court would replace _both_ the B.I.A. and the general courts.

Even when that assumption is made, the evaluation of any proposal for a specialized immigration court turns on several variables. The desirability of such a court hinges, for example, on what its jurisdiction would be. The court could be designated to review only deportation orders; deportation, exclusion, and possibly rescission, orders; all orders currently issued by the B.I.A.; or, conceivably, all decisions arising under the Immigration and Nationality Act. Evaluation might also depend on the contemplated standard of review. Review could be _de novo_, or it could be something less.

I shall assume a "pure" model of specialized court: a tribunal staffed by a permanent cadre of specialist judges who decide all the designated immigration cases and no other cases. That is the model put forward by all the recent proposals for specialized immigration courts. It is a model analogous to those either adopted or proposed in several other contexts as well.[494]

But it is not the only model of specialized adjudication. Others have been suggested. One kind of specialized court, like the pure model, would decide cases within the designated specialty and no other cases, but, unlike the pure model, would be staffed by generalist judges who rotate to the specialized

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492. (continued) important. In fiscal year 1984, immigration judges decided 102,736 cases, including 73,614 deportation cases and 7,531 exclusion cases. Letter to author from Hon. William R. Robie, Chief Immigration Judge (August 6, 1985). The same letter projected, for FY 1985, an even higher total of 129,445 decisions. And even those figures assume an increase in the backlog. The economic consequences of channeling that volume of cases to a tribunal resembling a court would be overwhelming.

[493] _See_ § III.E, and especially § III.E.2, _supra_.

[494] For examples, _see_ Craig, _Federal Income Tax and the Supreme Court: The Case against a National Court of Tax_

court on temporary assignments.[495] At least three other specialization arrangements would also concentrate all the cases of the designated specialty in a single court, but would give that court other responsibilities as well. One such arrangement would be a court that combines several selected specialties and nothing else.[496] Another would be an administrative law court patterned on the French Conseil d'Etat.[497] And a third possibility would be to select one of the existing federal courts as the exclusive repository for review of cases within a particular specialty.[498] Finally, even if existing jurisdictional lines are left unaltered, one option open to an individual court is to designate certain of its judges, for fixed time periods, to adjudicate all the cases that fall within a given area of the law.[499] As discussed below, the degree to which a model deviates from the pure specialized form will affect both the validity and the weight of the various policy arguments to be examined.

The dominant feature of a specialized court is the specialized subject matter of its cases. Most of the debate, predictably, has thus focused on the relative merits of specialist and generalist decisionmaking. The same will be true

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494. (continued) Appeals, 1983 Utah L. Rev. 679; Currie & Goodman, note 1 supra, at 62-63; Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153 (1944); Levinson, note 55 supra, at 654 & n.62; Miller, A Court of Tax Appeals Revisited, 85 Yale L.J. 228 (1975); Nathanson, The Administrative Court Proposal, 57 Va. L. Rev. 996 (1971); Symposium, 26 N.Y.L.S. L. Rev. 431 et seq. (1981) (customs and international trade).

[495] For examples, see Carrington, Meador, & Rosenberg, note 128 supra, at 169-72; Levinson, note 55 supra, at 654 n.62.

[496] See Currie & Goodman, note 1 supra, at 78-82; A.C.U.S. Views on Ash Council Report, note 141 supra, at 931-32 (opposing Ash Council recommendation that new court be created to hear appeals from transportation, power, and securities agencies). Cf. The United States Court of Appeals for the Federal Circuit.

[497] See generally L. Brown & J. Garner, French Administrative Law (2d ed. 1973); Caldwell, A Federal Administrative Court, 84 U. Pa. L. Rev. 966 (1936); H. Wade, Administrative Law 14-15 (5th ed. 1982).

[498] The court of appeals for the D.C. Circuit has exclusive jurisdiction to review certain administrative orders. See Carrington, Meador, & Rosenberg, note 128 supra, at 172-73; Currie & Goodman, note 1 supra, at 75.

[499] See Carrington, Substantive Division of the Circuits, in 2 P. Carrington, W. Christian, D. Karlen, B. Witkin (eds.), Appellate Justice at 271-76 (1975); Carrington, Meador, & Rosenberg, note 128 supra, at 174 et seq; Council on the Role of Courts, The Role of Courts in American Society 140 (1984); Pound, Specialized Courts or Specialized Judges, in 2 Appellate Justice, supra, at 265-66.

here. But proposals for specialized courts require other policy decisions as well. One is whether to create a single, centralized, forum or a network of tribunals geographically dispersed. Another is whether the proposed court should be of article III stature. These questions will be considered in turn.

A. Specialist or generalist?

1. Quality

Central to the argument for any specialized court are the benefits of specialized expertise.[500] The judges are expected to bring to the court, or at least to acquire, a deeper command of the subject matter than would be possible for legal generalists. Additional expertise would be supplied by the staff.[501] That expertise is especially valuable when the subject matter is technical but non-legal, as when scientific or other typically unfamiliar concepts must be understood.

As Nathaniel Nathanson has observed, however, it is not obvious that specialized expertise is a virtue for a reviewing court. When the court reviews findings of fact or the exercise of agency discretion, its role is to search for substantial evidence or for rationality, tasks requiring judgment more than expertise.[502] Nathanson also argues that even statutory interpretation requires "skills which are not significantly enhanced by concentration upon a single statute."[503]

That last suggestion probably overstates the case. Practice in interpreting a complex statute might itself enhance significantly the development of general statutory interpretation skills. Moreover, as others have persuasively pointed out, the expertise of a specialized tribunal can derive both from frequent contact with the statute and from the tribunal's opportunity to observe the practical consequences of its decisions.[504] The latter source of expertise is of greatest significance when the same tribunal also has regulatory responsibilities, but the point applies to solely adjudicative bodies as well. A general principle announced in one case might, for example, trigger subsequent litigation to iron out the specifics. A tribunal that repeatedly observes those kinds of patterns within a narrowly defined substantive sphere might be better able to predict the practical consequences of a contemplated holding.

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[500] Agency expertise is also cited frequently as a reason for judicial deference. See, e.g., Pearce, Judicial Review of Tribunal Decisions--The Need for Restraint, 12 Fed. L. Rev. 167, 174 (1981); P. Weiler, In the Last Resort 134 (1974); Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad L. Rev. 329, 332 (1979).

[501] Many have observed that the real agency expertise tends to lie in the staff. See, e.g., 3 K. Davis, note 131 supra, § 17.1; Freedman, Expertise and the Administrative Process, 28 Ad. L. Rev. 363, 376 (1976); Friendly, note 131 supra, at 179-80.

[502] Nathanson, note 494 supra, at 999-1000.

[503] Id. at 1000.

When a statute is as intricate as the Immigration and Nationality Act, those kinds of expertise can also strengthen the tribunal's capacity to synthesize related cases. A particular interpretation, when combined with the holding of a previous case, might create an anomaly that Congress could not have intended and that a legal generalist unaware of the previous case might not have spotted. Or a requested interpretation might lead to other practical consequences that are a proper subject of judicial consideration. The benefits of expertise in aiding the thoughtful resolution of a difficult legal question in a highly specialized area of the law should not be too casually dismissed.

All else being equal, therefore, specialized expertise can be a positive attribute even for a reviewing court. Two arguments strongly cut, nonetheless, against the creation of a specialized immigration court. The first, emphasized by numerous others, is the enormous advantage of a generalist perspective.[505] A legal generalist brings to the bench a greater ability to analogize to other areas of the law, to find solutions in those areas, and to approach specific problems with fewer preconceptions.[506] In immigration, that is not an academic point.[507] The cases frequently require application of principles drawn from administrative law,[508] constitutional law,[509] criminal law,[510] and family law.[511] The generalist perspective that would be valuable in resolving those problems would be lost if the courts of general jurisdiction were replaced by a specialized immigration court of the pure variety. Generalism would survive, however, under some of the modified models discussed earlier.[512]

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[504] Woodward & Levin, note 500 supra, at 332.

[505] E.g., Carrington, Meador, & Rosenberg, note 128 supra, at 168; Council on the Role of Courts, note 499 supra, at 139; Currie & Goodman, note 1 supra, at 68-69; A.C.U.S. Views on Ash Council Report, note 139 supra, at 931.

[506] Council on the Role of Courts, note 499 supra, at 139; Currie & Goodman, note 1 supra, at 68-69.

[507] Several opponents of a specialized immigration court have stressed the loss of this generalist perspective. See Barker, A Critique of the Establishment of a Specialized Immigration Court, 18 San Diego L. Rev. 25, 27 (1980); Orlow, note 440 supra, at 50; Wildes, note 440 supra, at 57.

[508] See especially the cases concerned with rulemaking, e.g. Patel v. I.N.S., 638 F.2d 1199, 1203 (9th Cir. 1980); Yassini v. Crosland, 618 F.2d 1356, 1361 (9th Cir. 1980), and the cases defining the judicial role in reviewing agency discretion, e.g., I.N.S. v. Rios-Pineda, 105 S.Ct. 2098 (1985); I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981).

Another consideration strongly favoring generalist review is that exploiting the strengths of the generalist does not waste the knowledge of the specialist. Perhaps the most valuable property of specialized expertise is its capacity to be transmitted. Expert witnesses in judicial trials assist lay jurors in performing their factfinding mission. Expert witnesses testifying before legislative committees help lawmakers to discharge their policymaking functions. Expert consultants make recommendations to government agencies and commissions.

Expert administrative tribunals are no different. By drafting carefully reasoned opinions, they can communicate to the reviewing court any special insights that will aid the resolution of an individual case. Generalist review can thus be seen as an instrument for combining the joint thinking of generalists and specialists.

2. Efficiency

Proponents of a specialized immigration court have also stressed efficiency. Even apart from any time savings that would result from the expert's familiarity with the law, a specialized court would eliminate one step in the process.[513] Instead of an administrative appeal followed by judicial review, there would be only one appellate round.[514] The result, it is argued, would save monetary costs, reduce delays, and ease the burden on the federal courts of general jurisdiction. As for the last point, a new specialized court might be thought preferable to adding new circuits, which would aggravate the number of inter-circuit conflicts, or to expanding the sizes of the existing courts, an approach that would strain the process of collegial decisionmaking.[515]

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[509] See Legomsky, note 266 supra.

[510] See generally National Lawyers Guild, Immigration Law and Crimes (1984).

[511] See Aleinikoff & Martin, note 8 supra, at 125-54.

[512] E.g., a specialist court staffed by rotating generalist judges; a general court of appeals designated as the sole repository of all immigration cases; and a specialized rotation system within a general court.

[513] Levinson, note 55 supra, at 653; S.C.I.R.P. Final Report, note 444 supra, at 249; Hon. B. Graham, Gov. of Fla., testimony at Joint Hearings, note 459 supra, at 110; Hon. B. McCollum, testimony at Joint Hearings, supra, at 339. Attorney General Smith, testifying at the same hearings, stated that illegal aliens have some seven steps from the initial administrative decision to the courts. Id. at 340. It is not clear how he arrived at that figure or which steps other than the deportation hearing, the B.I.A. appeal, and the petition for review he was counting.

In the immigration context, those arguments are not weighty. Although the new court would indeed eliminate a step, it is a step that, as discussed above, has benefits worth preserving. Further, the low present volume of immigration cases in the federal courts[516] would make the savings minimal.

Most important of all, defining the stature of the new judges would present a Catch 22. If the new judges are paid appreciably less than the article III judges they replace,[517] it can be assumed that judges of article III caliber will be difficult to attract. In an area where important individual interests are at stake, serious questions as to both the actual and the perceived quality of justice would then arise. Conversely, if the salary levels of the new judges approach those of their article III counterparts, the costs of the new system would be astronomical. In fiscal year 1984, the Justice Department's immigration judges decided 73,614 deportation cases alone,[518] and the B.I.A. decided 1909 appeals from deportation orders.[519] To assign a case volume of that magnitude to high-level federal judges would require staggering expenditures. The new structure would, it is true, eliminate the costs incurred in those deportation cases where aliens would otherwise have sought judicial review of B.I.A. decisions. But those cases are much fewer.[520] More sensible, it seems, is to use the less expensive administrative machinery to process the vast bulk of the cases, and to preserve the right of judicial review for the tiny proportion of aliens who seek it.[521]

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[514] Cf. the 1985 McCollum bill, note 432 supra, which would permit review by certiorari in the U.S. Court of Appeals for the Federal Circuit. And none of the legislative proposals for a specialist immigration court, note 491 supra, would remove the certiorari jurisdiction of the Supreme Court.

[515] See Currie & Goodman, note 1 supra, at 63-65; see also Roberts, note 55 supra, at 20; Robinson, note 139 supra, at 971-72 (answering arguments made by Ash Council).

[516] See Appendix, infra.

[517] Rep. McCollum originally proposed that the trial judges and the appellate judges of a new, article I, immigration court be paid the same salaries as United States district judges and circuit judges, respectively. H.R. 5649, 97th Cong., 2d Sess., March 1, 1982. His most recent bill, however, would rank the new judges as GS-16 and GS-17, respectively. H.R. 3187, 99th Cong., 1st Sess., Aug. 1, 1985.

[518] See note 492 supra.

[519] See Appendix, infra.

3. Side-effects of specialized jurisdiction

A court that hears only immigration cases would raise other concerns as well. A specialized court can become too sympathetic to the agency whose decisions it reviews.[522] The nature of the work might prevent the recruiting of individuals as talented as those presently occupying the federal bench.[523] Appointments to the court are likely to be more heavily influenced by intensive lobbying because of the greater impact that the judges will have on narrow issues affecting special interest groups.[524] Post-appointment biases might develop more easily than in generalist courts because of the concentrated exposure to a narrow area.[525] And the public might be more likely to perceive, rightly or wrongly, a bias in the court's disposition of a case.[526] These problems can be mitigated by deviating from the pure model of specialized court in any of the ways described earlier.[527]

B. Centralized or Dispersed?

A specialized court need not be a single, centralized, entity. A system of geographically dispersed courts that specialize in the same defined subject matter would be possible. But if, as is true in immigration, the volume of appellate cases is small and collegial review is desirable, it would be difficult to construct a system of pure specialized courts in which the judges are not frequently idle. The modified models offer greater promise. The subject matter could, for example, be made to include other selected areas as well. Or, if more than one of the general courts of appeals were to assign rotating panels of judges to decide all the immigration cases those courts receive,[528] the resulting structure would be another form of dispersed specialization.

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[520] Only 418 deportation orders, and only 27 exclusion orders, were the subjects of judicial review in FY 1984. *See* Appendix, *infra*.

[521] In FY 1984, the 418 deportation cases decided by the courts of appeals represented only 0.6% of the 73,614 deportation orders issued by immigration judges. *See* notes 492, 520 *supra*.

[522] *A.C.U.S. Views on Ash Council Report*, note 139 *supra*, at 932; *Council on the Role of Courts*, note 499 *supra*, at 136; *Currie & Goodman*, note 1 *supra*, at 71; *Robinson*, note 139 *supra*, at 959.

[523] *Carrington, Meador, & Rosenberg*, note 128 *supra*, at 168; *Currie & Goodman*, note 1 *supra*, at 70.

[524] *Carrington, Meador, & Rosenberg*, note 128 *supra*, at 168; *Currie & Goodman*, note 1 *supra*, at 70-71.

[525] *Id.* at 71-72.

[526] *Id.* at 72.

[527] See notes 495-99 *supra* and accompanying text. *See also* *Carrington*, note 499 *supra*, at 271-72; *Carrington, Meador, & Rosenberg*, note 128 *supra*, at 169-76; *Council on the Role of Courts*, note 499 *supra*, at 136; *Currie & Goodman*, note 1 *supra*, at 72-73.

The most significant advantage of centralized appellate adjudication is uniformity.[529] As discussed earlier, inter-circuit conflicts can produce instability and inequality.[530] They are the kinds of conflicts that the Supreme Court frequently harmonizes,[531] but the process can take years[532] and in the meantime the instability persists. Moreover, a conflict between circuits can invite forum-shopping.[533]

But the importance of uniformity should not be exaggerated. Inter-circuit conflicts, at least in immigration, have not been unusually frequent.[534] Perhaps they would become so if deportation cases were shifted to the district courts, but with court of appeals review, splits of authority have been relatively few. The explanation might be partly geographic. As noted earlier, over 60% of all petitions for review of deportation orders are filed in one court, the Ninth Circuit.[535] The less even the distribution, the less opportunity there is for conflicts to emerge. That observation might simply mean that, as a practical reality, immigration cases are presently centralized to a significant degree. In addition, the Supreme Court's enthusiastic displays of deference to B.I.A. interpretations[536] have also had a unifying effect. And, even when inter-circuit conflicts do give aliens an incentive to forum-shop, statutory limitations on venue[537] normally restrict the opportunities.

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[528] See note 499 supra and accompanying text.

[529] Levinson, note 55 supra, at 653; Roberts, note 55 supra, at 13-14, 19-20; S.C.I.R.P. Final Report, note 444 supra, at 249; see also Friendly, note 131 supra, at 183 (national administrative court would enhance uniformity); Robinson, note 139 supra, at 971-73 (evaluating Ash Council argument that new specialized court would promote uniformity).

[530] Currie & Goodman, note 1 supra, at 65-66. It was primarily in the interests of certainty that the Administrative Conference recommended channeling to the D.C. Circuit all review of national standards set by the E.P.A. under the Federal Water Pollution and Control Act. See A.C.U.S. Rec. 76-4, 1 C.F.R. § 305.76-4, item 1 & Rec. A.1 (1985). Conflicts can also be evidence of inefficiency. See note 539 infra and accompanying text.

[531] Barker, note 507 supra, at 26.

[532] See Craig, note 494 supra, at 681 (addressing arguments for national court of tax appeals).

[533] Currie & Goodman, note 1 supra, at 65.

[534] Wildes, note 440 supra, at 63.

[535] See note 245 supra.

A second advantage of centralization is that it can contribute further to expertise.[538] The more cases of a given type a court receives, the more specialized expertise that court is likely to develop. As an argument for a specialized immigration court, however, that factor is also less weighty than might first be thought. As just noted, a majority of the cases are already being decided by a single court in which substantial expertise has begun to accumulate. Further, to the extent that a single specialized court would make that process complete, it becomes relevant to repeat that specialized expertise is not wholly beneficial.

A third advantage of centralized review is increased efficiency. The fewer courts that need to struggle with the same issues, the less time will be consumed deciding them. But that very strength is also a weakness. As courts adopt varying approaches to similar problems, new insights emerge and analyses mature. This process of gradual evolution has been applauded by many others.[539]

Apart from the weightlessness of its benefits, centralized review has affirmative shortcomings. One is the dangerous concentration of power in a small group of people.[540] The previous section noted ways in which both the appointment process and the day-to-day work of a specialized court can produce biases. Centralization prevents the diffusion of those biases. It increases the probability that a given legal issue will be decided by judges whose values are not representative of society or even of the judiciary. That factor is relevant to a discussion of almost any proposal for a specialized court, but it is particularly compelling in immigration law, where decisions are highly sensitive to personal values and philosophies. The ongoing battles between the Ninth Circuit and the Supreme Court are nowhere more evident than in immigration, and they attest to the close connection between ideology and adjudication in this field of law.[541] That consideration alone seems a convincing reason to reject a pure model of specialized immigration court. The modified versions lessen this problem, but even they would permit a handful of individuals to wield enormous power in an area where personal values are often dispositive.

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[536] E.g., I.N.S. v. Rios-Pineda, 105 S.Ct. 2098 (1985); I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981).

[537] A petition for review of a deportation order may be filed only in the circuit where the deportation hearing was held or the circuit in which the alien resides. I. & N. Act § 106(a)(2), 8 U.S.C. § 1105a(a)(2).

[538] Currie, note 178 supra, at 1262.

[539] E.g., United States v. Mendoza, 464 U.S. 154, 160 (1984); Currie & Goodman, note 1 supra, at 69-70; Friendly, note 131 supra, at 186-87.

[540] Currie, note 178 supra, at 1262; Currie & Goodman, note 1 supra, at 69-70.

A final consideration is that a single centralized court would drastically increase the costs of oral argument.[542] The immigration bar is clustered in many large urban centers spread throughout the country.[543] In addition to the political turmoil that the process of choosing a site would generate, any site that is eventually chosen would pose serious problems for a majority of the immigration bar, and therefore for the aliens to whom the costs would be passed on. Not a wealthy group, aliens might often be forced to forego oral argument solely for economic reasons. The judges of the specialized court could ameliorate the problem by riding circuit,[544] but that option too would entail a monetary cost to the public.

C. Article I or Article III?

Article III, section 1 of the United States Constitution authorizes Congress to establish inferior courts whose judges must be given life tenure and a guarantee against salary reductions. In certain circumstances, however, Congress may constitutionally create adjudicative tribunals that are not subject to the limitations contained in article III.[545] It is customary to call these bodies "legislative" or "article I" courts.

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[541] See, e.g., I.N.S. v. Lopez-Mendoza, 104 S.Ct. 3479 (1984); I.N.S. v. Delgado, 104 S.Ct. 1758 (1984); I.N.S. v. Phinpathya, 104 S.Ct. 584 (1984); I.N.S. v. Miranda, 459 U.S. 14 (1982); I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981). A more detailed account of the battles is S. Loue, Alien Rights and Government Authority: An Examination of the Conflicting Views of the Ninth Circuit Court of Appeals and the United States Supreme Court, 22 San Diego L. Rev. 1021 (1985).

[542] See generally Currie, note 178 supra, at 1262; Currie & Goodman, note 1 supra, at 74. Roberts, in proposing a specialized immigration court, acknowledges the problem. See Roberts, note 55 supra, at 13. But see note 544 infra and accompanying text.

[543] See note 251 supra and accompanying text.

[544] See Currie & Goodman, note 1 supra, at 74 & n.331 (also observing that the need for travel could reduce the attractiveness of the job); Friendly, note 131 supra, at 169; Roberts, note 55 supra, at 19.

Advocates of a specialized immigration court have uniformly recommended that the new tribunal be of article I stature.[546] Opponents of an exclusive, specialized, immigration court either explicitly object,[547] or can be assumed to object,[548] to the article I feature.[549]

Whether an immigration court whose judges have neither life tenure nor protection against diminutions in pay would violate article III is not entirely free from doubt. Both the language and the rationales of leading Supreme Court decisions suggest, however, that there would be no constitutional bar. The Court has consistently recognized a "public rights" exception to the requirements of article III. The law was recently summarized in the Northern Pipeline case: Legislative courts may be used to adjudicate cases arising

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[545] See notes 550-53 infra and accompanying text.

[546] See Levinson, note 55 supra, at 653; Roberts, note 55 supra, at 18; S.C.I.R.P. Final Report, note 444 supra, at 248-49; see also the testimony of Hon. B. Civiletti, Joint Hearings, note 459 supra, at 100; Hon. B. Graham, id. at 110; Hon. B. McCollum, id. at 113. The legislation introduced by Rep. McCollum would also make the new immigration court an article I tribunal. See note 491 supra.

[547] E.g., Juceam & Jacobs, note 229 supra, at 43.

[548] Those who oppose eliminating the role of the general article III courts, and whose opposition is based even in part on the loss of either actual or perceived independence, would be expected to maintain that, if a specialized court is nonetheless given exclusive jurisdiction over immigration cases, the court should at least have article III independence. Those whose opposition is grounded solely on the loss of the generalist perspective or on the concentration of power cannot be assumed to prefer article III courts. See generally the articles responding to Roberts, note 55 supra, at 25 et seq.

[549] A.C.U.S. Views on Ash Council Report, note 139 supra, at 932 (opposing replacement of certain regulatory commissions with single specialized court, and objecting particularly to article I feature).

> between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments [when these cases] . . . could have been determined exclusively by those departments.[550]

The clear rationale for the exception is that, when no judicial review at all is constitutionally mandated, the less drastic approach of adjudication by article I courts must also be permissible.[551]

In Crowell v. Benson, the Court in dictum expressly listed immigration as one of the subject areas that would appear to qualify for the public rights exception.[552] That dictum seems correct, since the Court has long emphasized the political nature of Congress's decisions to define the categories of excludable and deportable aliens, and has long held that those decisions may constitutionally be committed to the executive branch.[553]

Assuming constitutionality, what would be the advantages of an article I immigration court? One benefit would be to maximize congressional flexibility. Free of the constraints imposed by article III, Congress could dissolve the court entirely if the arrangement were later found unworkable, or reduce the size of the court if case volumes fell. In theory those options would be open to Congress even if the court were of article III stature, but in that event there would arise the difficult task of reassigning the highly specialized judges to courts of general jurisdiction. Further, with an article I court, Congress would be able to reduce the judges' salaries if budgetary problems arose. Finally, apart from flexibility, creating an article I tribunal might smooth the transition by making politically more feasible the initial appointments of present immigration judges and B.I.A. members who might not meet the standards for article III judges.

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[550] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68 (1982). The Court was drawing partly from Crowell v. Benson, 285 U.S. 22, 50 (1932) and partly from Ex parte Bakelite Corp., 279 U.S. 438, 458 (1929).

[551] 458 U.S. at 68. In its most recent discussion of this subject, the Supreme Court seemed less confident about the precise boundaries of the "public rights" exception but nonetheless reluctant to apply article III constraints to the adjudications of federal administrative agencies. See Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325, 3334-39 (1985).

[552] 285 U.S. at 51; see also Northern Pipeline, 458 U.S. at 69 n.22.

[553] See Legomsky, note 266 supra, at 261-69. But cf. id. at 299-303 (decision in I.N.S. v. Chadha, 462 U.S. 919 (1983), might suggest willingness to recede from strict application of principle of plenary congressional power). See also Beck, note 265 supra, §§ 4,5 (open question whether Congress may constitutionally invest article I courts with exclusive power to grant habeas corpus).

But each of those "advantages" is dubious. What proponents call flexibility, opponents would call insecurity. If the new court is to discharge the functions presently served by the article III courts of general jurisdiction, independence would seem vital. At some point in the process there must be, and there must be perceived to be, judges free of the temptation to succumb to political or economic pressure. Moreover, when such important interests are at stake, it is critical to attract judges of the highest caliber. The lesser prestige and the lesser security of an article I judgeship would hamper that goal. And if the point of the article I feature is to permit the transfer of those current immigration judges and B.I.A. members who would lack the qualifications for article III appointments, the short answer would seem to be that individuals who do not meet the usual high standards should not be selected.

CONCLUSIONS[554]

General

The goal of this article has been to develop, with an eye toward immigration cases, an approach for selecting the forum in which administrative adjudication can most effectively be reviewed. The central thesis has been that administrative review and judicial review are best examined together.

To evaluate a given structure for the review of administrative adjudication, a three-step process is recommended. One should first isolate the relevant properties that distinguish district courts from courts of appeals and those that distinguish from each other the administrative review bodies potentially available in the particular substantive area. Forum attributes are relevant to the extent they either advance or impede the accuracy, the efficiency, the acceptability, or the consistency of the administrative process. In identifying the relevant properties, it is convenient to begin with the primary, objective, distinguishing attributes and then to ascertain what secondary, subjective, attributes flow from them. The latter will be the strengths and weaknesses of the tribunals as reviewing bodies. A chart has been prepared to summarize the primary and secondary attributes that distinguish the district courts from the courts of appeals and those that distinguish the two principal administrative reviewers available in immigration -- the Board of Immigration Appeals and the Administrative Appeals Unit. As the chart illustrates, most of the secondary distinctions between district courts and courts of appeals parallel those between the B.I.A. and the A.A.U. Analogous correlations will often be found in other areas of administrative law, except that in some other fields the administrative tribunals might differ in degree of political accountability.

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[554] The conclusions on administrative review forum and on the structure and independence of the B.I.A. were adopted, with some modifications, by the plenary session of the Administrative Conference of the United States on Dec. 12, 1985. For the reasons discussed in notes 300A to 300I *supra*, the recommendations on judicial review were not adopted. *See* 50 Fed. Reg. 52894 (Dec. 27, 1985).

Almost any review forum realistically available will possess both strengths and weaknesses. For some classes of administrative decisions, the strengths of a particular tribunal might outweigh its weaknesses. The next step, therefore, is to identify those attributes of cases that will affect the importance to be attached to the various strengths and weaknesses of the available forums. For the forum choices available in immigration law, eleven such case attributes were identified. If another subject area is one in which the possible administrative review bodies differ in respects analogous to those that distinguish the B.I.A. from the A.A.U., then the case attributes developed here should carry over. If the competing administrative review forums differ also in degree of political accountability, then an additional case attribute influencing forum choice should be the frequency with which the cases raise questions of policy.

The third and final step is to determine which of the case attributes just developed tend to be present in the class of cases being studied. Several categories of immigration decisions were considered here. The process and the results of applying the eleven case attributes to these illustrative classes of immigration cases were described in section III.

Administrative Review

Orders of deportation and exclusion should continue to be appealable to the B.I.A. But the current regulations governing administrative review of the many miscellaneous orders made under the Immigration and Nationality Act should be completely redone. Patterns reflected in the choices between the B.I.A. and the A.A.U. are not evident.

Several specific changes are recommended. All visa petitions should be appealable to the B.I.A.; the orphan petitions, the fiancé(e) petitions, and the occupational petitions (both immigrant and nonimmigrant) should therefore be transferred from the A.A.U. to the B.I.A. The announced proposal to eliminate B.I.A. jurisdiction over district directors' denials of 212(c) waivers should be withdrawn. Appeals from district directors' denials of 212(d)(3) waivers should be transferred from the B.I.A. to the A.A.U. Appeals from district directors' denials of 212(h) and 212(i) waivers, and from their denials of applications to waive the two-year foreign residence requirement for exchange visitors, should be transferred from the A.A.U. to the B.I.A. Appeals from orders rescinding adjustment of status should probably remain with the B.I.A.

Those are only a few of the eight categories of B.I.A. jurisdiction and twenty-six categories of A.A.U. jurisdiction. The Justice Department should systematically reexamine each of those forum choices in the light of the case attributes developed in section II.

The B.I.A., which presently decides all cases en banc, should adopt a panel system. En banc review should be available, at the discretion of the Board, only upon request of the Attorney General, the I.N.S. Commissioner, a Board member, or, in the case of a split panel, the aggrieved individual. That change, together with any necessary increase in support staff, would probably accommodate the recommended transfer, from the A.A.U. to the Board, of a large volume of cases. If necessary, however, the size of the Board could be expanded slightly without undue expense or the loss of collegial deliberation. The case transfer recommended here would also permit a reduction in the size of the A.A.U. The Unit should be retained, nonetheless, for cases that do not require the more sophisticated resources possessed by the B.I.A.

Views as to the proper relationship between the B.I.A. and the Attorney General turn largely on general preferences for the political or the judicial models of agency decisionmaking. They hinge also on perceptions as to the types of issues likely to arise in immigration cases. The Board, now a creature only of administrative regulation, should be made a statutory body. It should probably remain within the Department of Justice. Its members should be appointed by the President and confirmed by the Senate. They should be given a high degree of job security. The statute should confer jurisdiction over deportation, exclusion, and rescission orders. The Attorney General should be authorized to expand the Board's jurisdiction further. And the Attorney General should retain the power to review individual B.I.A. decisions but should exercise that power only in extraordinary cases.

Judicial Review

Subject to existing exceptions for habeas corpus and for nonfrivolous claims of United States nationality, deportation orders should continue to be reviewable exclusively in the courts of appeals. The original rationale of inhibiting delay is not a convincing reason for direct court of appeals review, but other arguments do seem persuasive. Congress should make conscious policy decisions as to both the availability of habeas corpus and the scope of habeas review in deportation cases. The habeas provision should be clarified to reflect those policy judgments.

Exclusion orders are presently reviewable only by habeas corpus in the district courts. Congress should vest concurrent jurisdiction in the courts of appeals.

Absent an accompanying order of deportation or exclusion, most of the miscellaneous orders should continue to be reviewable in the district courts. One order that should be shifted to the courts of appeals, however, is rescission. If the courts of appeals are given concurrent jurisdiction over exclusion orders, then it might also be beneficial to give the courts of appeals jurisdiction over district directors' denials of various waivers of inadmissibility. Certain of the visa petitions might be suitable also for direct court of appeals review, but that decision should be deferred until more complete numerical information becomes available.

To prevent litigation over jurisdictional issues and to avoid unnecessary bifurcation of individual cases, courts of appeals should be granted the discretion to assert pendent jurisdiction over miscellaneous immigration orders when review of deportation, exclusion, or rescission orders is also being sought. That approach would permit a case-by-case evaluation of the merits of consolidation.

Section 279 of the Immigration and Nationality Act gives the district courts jurisdiction over all cases arising under the main title of the Act. Now that general federal question jurisdiction no longer requires a minimum amount in controversy, section 279 is superfluous. Moreover, it has generated unnecessary issues as to preclusive effect. Section 279 should, therefore, be repealed. If it is retained, however, it should at least be amended to clarify that it is subject to those statutory provisions that define exclusive procedures for review of orders of deportation, exclusion, and, if previous recommendations are adopted, rescission.

Specialized Court

A pure variety of specialized court, intended to replace the roles of the courts of general jurisdiction, is not recommended. Several considerations seem paramount: The application of a generalist perspective is unusually valuable in immigration law. The present scheme does not waste the benefits of specialized expertise because the B.I.A. communicates its insights through reasoned written opinions. Either the new judges would be paid less than current federal judges, in which case the quality of justice would suffer on several counts, or the new judges would be paid the same salaries as current federal judges, in which case the costs would be prohibitive for reasons discussed earlier. Finally, in a field where adjudication is so profoundly influenced by personal values, a specialized court with exclusive jurisdiction would represent an unhealthy concentration of power. Several modified versions of specialized courts would mitigate many of these objections, but on balance the adoption of even the modified models is not recommended.

Apart from the comparative merits of specialists and generalists, courts reviewing immigration cases should remain geographically dispersed. Centralization would have numerous disadvantages.

Lastly, if a specialized immigration court is created, the court should be of article III stature. An article I immigration court would probably be constitutional, and such a court would have certain advantages, but the magnitude of the interests at stake renders the disadvantages greater.

APPENDIX

IMMIGRATION CASELOADS
FOR FISCAL YEAR 1984

I. Board of Immigration Appeals*

Type	Number of Cases	% of Total
Deportation	1909	61.0%
Exclusion	307	9.8%
Bond	185	5.9%
Rescission	17	0.5%
Visa petitions	635	20.3%
Fines	46	1.5%
212(c) and 212(d)(3) waivers	32	1.0%
Total	3131	100.0%

II. Administrative Appeals Unit**

Type	Number of Cases	% of Total
Nonimmigrant visa petitions (L and H)	803	30.3%
Immigrant occupational preference visa petitions (3d and 6th preferences)	625	23.6%
Breaches of bond conditions	822	31.0%
Waivers of excludability	191	7.2%
Other	208	7.9%
Total	2649	100.0%

III. Judicial Review***

	Cases Decided
A. Petitions for Review of Deportation Orders Filed Directly in Courts of Appeals:	
Asylum claimed	85
Asylum not claimed	333
Total	418

B. Cases Originating in District Court	District Court Decisions	Court of Appeals Decisions in Appeals From District Court Decisions
Deportation (habeas)		
Asylum claimed	15	6
Asylum not claimed	51	5
Total deportation (habeas)	66	11
Exclusion (habeas)		
Asylum claimed	17	1
Asylum not claimed	10	1
Total exclusion (habeas)	27	2
Miscellaneous challenges to deportation and exclusion orders	22	8
Adjustment of status	81	2
Nonimmigrant visa petitions	16	3
Immigrant visa petitions	152	5
Labor certification	9	4
Waivers of inadmissibility	18	1
Misc. asylum and refugee matters	8	0
Other challenges to denials of benefits	27	5
Citizenship matters (excluding uncontested naturalization petitions)	53	4
Challenges to State Dept. action	7	3

* Sources: Letter from David B. Holmes, Chief Attorney Examiner of B.I.A., Executive Office for Immigration Review, Dept. of Justice, to author, July 3, 1985; follow-up telephone conversation, July 12, 1985. Figures are cases decided.

** Source: Letter from Lawrence J. Weinig, Chief, Administrative Appeals Unit, I.N.S., to Andrew J. Carmichael, then Associate Commissioner for Examinations, I.N.S., Nov. 13, 1984. Figures are cases decided.

*** Source: Interview with Robert L. Bombaugh, Director, Office of Immigration Litigation, Civil Division, Dept. of Justice, June 13, 1985. These figures have been excerpted from the data provided orally at the interview. They represent cases filed.

BACKGROUND REPORT FOR RECOMMENDATION 85-5

ANALYSIS OF FOUR NEGOTIATED RULEMAKING EFFORTS

FINAL REPORT - NOVEMBER 15, 1985

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TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION AND SUMMARY

§1.1 Introduction
§1.2 Conclusions
§1.3 Recommendations

CHAPTER 2 - LEGAL AND POLITICAL BACKGROUND

§2.1 History of the Negotiated Rulemaking Idea
§2.2 Theoretical Foundation
§2.3 --Dynamics of Regulatory Negotiation
§2.4 —Characteristics of Interest Groups
§2.5 --Characteristics of Regulatory Programs
§2.6 Criteria for Negotiated Rulemaking

CHAPTER 3 - THE BENZENE NEGOTIATIONS

§3.1 Introduction
§3.2 History of OSHA Regulation of Benzene
§3.3 Decision to Negotiate
§3.4 Chronology of Benzene Negotiations
§3.5 Issues in Negotiation
§3.6 Benzene as a Candidate for Negotiated Rulemaking
§3.7 Incentives to Participate - In General
§3.8 Incentives for OSHA to Participate
§3.9 Incentives for Labor to Participate
§3.10 Incentives for Industry to Participate
§3.11 Differences Among the Industry Participants and Within Industry Constituencies
§3.12 Intra-Labor Movement Differences
§3.13 Negotiation Protocols
§3.14 The Negotiation Process
§3.15 Reasons Why No Rule Was Agreed Upon
§3.16 Federal Advisory Committee Act Problems

CHAPTER 4 - THE FAA FLIGHT AND DUTY TIME NEGOTIATIONS

§4.1 Introduction
§4.2 History of Flight and Duty Time Regulation
§4.3 Pre-Negotiation Activities
§4.4 Establishment of Negotiating Committee
§4.5 Suitability of Subject Matter
§4.6 Incentives to Participate
§4.7 Intraparty Differences
§4.8 The Negotiations
§4.9 Final Rule
§4.10 Dynamics of Negotiation and Reasons for Success
§4.11 Federal Advisory Committee Act Issues
§4.12 Administrative Procedure Act Issues

CHAPTER 5 - ENVIRONMENTAL PROTECTION AGENCY NEGOTIATIONS

§5.1 Introduction
§5.2 The Negotiation Project
§5.3 NONCONFORMANCE PENALTIES
§5.4 —Background of Nonconformance Penalties
§5.5 —Prenegotiation Activities
§5.6 —Establishment of the Negotiating Committee
§5.7 —Incentives to Participate
§5.8 —Intra-constituency Problems
§5.9 —The Negotiations
§5.10 —Post Consensus Process
§5.11 —Final Rule
§5.12 PESTICIDE EXEMPTIONS
§5.13 —Background
§5.14 —Formation of the Negotiating Committee
§5.15 —Pre-negotiation Preparations
§5.16 —Incentives to Participate
§5.17 —The Negotiations
§5.18 —Post Consensus Process

CHAPTER 6 - OTHER LABOR DEPARTMENT NEGOTIATIONS

§6.1 Introduction
§6.2 Coke Oven Negotiations
§6.3 The Cotton Dust Experience
§6.4 MDA Negotiations
§6.5 —Suitability of MDA for Negotiated Rulemaking
§6.6 —Planned Negotiating Process

CHAPTER 7 - COMPARATIVE ANALYSIS

CHAPTER 8 - ANALYSIS OF SPECIFIC LEGAL ISSUES

§8.1 Introduction
§8.2 Hybrid Rulemaking
§8.3 Delegation Problems
§8.4 Ex Parte Communications
§8.5 Judicial Review Under Arbitrary and Capricious Standard
§8.6 Federal Advisory Committee Act Problems

CHAPTER 9 - CONCLUSIONS AND RECOMMENDATIONS

§9.1 Introduction
§9.2 Conclusions
§9.3 Recommendations

CHAPTER 1

INTRODUCTION AND SUMMARY

§1.1 Introduction

In 1982, the Administrative Conference of the United States issued Recommendation 82-4,[1] encouraging the use of negotiated rulemaking by federal agencies. The concept of negotiated rulemaking arose from dissatisfaction with notice-and-comment and hybrid rulemaking under the Administrative Procedure Act, which had become increasingly adjudicatory and adversarial in character since the 1960's.

Since Recommendation 82-4 was issued, negotiated rulemaking has been utilized four times by federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for airline flight crews. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions, and on emergency exemptions from pesticide regulations, and is well underway in negotiating farmworker protection standards. The Occupational Safety and Health Administration encouraged Labor, public interest and Industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did result in at least partial agreement, and in proposed rules based on the negotiations. Two of the rules have been promulgated in final form, and neither has been challenged yet.

This document reports on an investigation commissioned by the Administrative Conference. It gives particular attention to the benzene negotiations, because they alone among the four completed initiatives have not been subjected to a contemporaneous or post-hoc investigation by a non-participant. It also summarizes the course and results of the other three negotiations, and undertakes a comparative analysis of the four initiatives

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[1] 47 Fed.Reg. 20708 (Jul.15, 1982), codified at 1 C.F.R. §305.82-4 (1984).

The benzene negotiation was investigated by interviews with virtually all the participants and with selected OSHA personnel. Other negotiations were investigated through more selective interviews and by reviewing agency and contractor documentation.

Proponents of more effective and fair government owe a considerable debt to the individuals who participated in the negotiations, to the convenors, facilitators and mediators, to agency personnel who worked hard to promote the negotiation idea, and to the Administrative Conference. Particular credit should be given to Neil Eisner at DOT, Chris Kirtz at EPA, and to Phil Harter, for their untiring efforts to make negotiated rulemaking a realistic possibility for improving the administrative process. To preserve confidentiality of sources, the identity of interviewees will not be disclosed. Despite the non-disclosure, the author much appreciates the willingness of many participants to express their views candidly and fully.

The report is divided into nine chapters. Chapter 2 reviews the evolution of the negotiated rulemaking concept against a backdrop of administrative law developments and of policy initiatives by Labor Secretary John T. Dunlop and others in the mid-1970's. Particular emphasis is given to the proposal presented in a law review article by Philip J. Harter in 1982, suggesting how negotiated rulemaking ought to work. The chapter also offers conceptual models drawn from political science and dispute resolution literature leading to hypotheses as to the preconditions for successful negotiation. Chapter 3 reviews the benzene negotiations. Chapter 4 reviews the FAA negotiations. Chapter 5 reviews the two EPA negotiations. Chapter 6 summarizes OSHA's past experiences with, and future plans for, negotiated rulemaking, in order to give some additional flavor to the special circumstances of the benzene negotiations. Chapter 7 compares the four negotiations. Chapter 8 discusses major legal issues affecting future use of negotiated rulemaking. Chapter 9 offers the author's conclusions and recommendations.

§1.2 Conclusions

Negotiations have proven to be effective in some circumstances in developing widely acceptable proposals for agency rules. Experience has shown that "Negotiated Rulemaking" is a practical alternative to Notice-and-Comment or Hybrid Rulemaking, and that Recommendation 82-4 is basically sound. Some parts of the recommendation need amplification, however. ACUS should consider issuing further recommendations because interest in negotiated rulemaking is growing, and it is natural for interested persons to wonder how 82-4 has worked out in practice.

It is important to view the original recommendations and those contained in this report as a guide to issues to be considered rather than a formula to be followed. Negotiation intrinsically is process that cannot be specified entirely in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by affected parties, past relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views among individual units within each constituency represented, and the skill of agency personnel and mediators. Some of these variables, or particular configurations of variables existing when negotiations commence, almost certainly will change several times before negotiations conclude. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate and the definition of consensus, either in general or in the context of a particular proceeding.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real-world uncertainties. An agency cannot expect that the pattern followed successfully by another agency, or even by itself on another issue, can be transplanted automatically to another negotiation without modification. Elements of Recommendation 82-4 and the recommendations contained in this report should be taken as a conceptual framework with which to design actual negotiations in a particular proceeding, and not as a formal model. Agencies that are considering negotiated rulemaking for the first time should read the body of this report and other literature on negotiations to understand the subtleties of negotiated rulemaking. Such agencies also will find it helpful to discuss their plans with persons experienced in the process.

It is premature to amend the Administrative Procedure Act ("APA") to provide for negotiated rulemaking. The risk of amending the APA now is that flexibility to adapt the negotiation process to the needs of different regulatory situations might be destroyed.

The four agency experiences do not show that the Federal Advisory Committee Act ("FACA"), as interpreted by the sponsoring agencies and participants, was a serious impediment to effective negotiations. The purpose of the Act is satisfied when a properly balanced rulemaking negotiation is conducted, and the statute should not impose additional requirements that jeopardize the success of negotiation. There is no reason to believe, under current judicial and agency interpretation of the Act, that caucuses and other working group meetings may not be held in private, where this is necessary to promote an effective exchange of views. Agencies should not be deterred from considering negotiated rulemaking by a perception that the negotiating group will be an "Advisory Committee" under the Act. Accordingly, the Administrative Conference should make no further recommendation pertaining to the Federal Advisory Committee Act at this time. Some uncertainty can be reduced, however, if the GSA amends its regulations to make it clear that meetings of caucuses and subgroups can be closed.

§1.3 Recommendations

Recommendations 1-8 represent desirable amplifications in ACUS Recommendation 82-4. Recommendations 9-11 relate to further ACUS activity to support negotiated rulemaking.

1. An agency sponsoring a negotiated rulemaking should take part in negotiations. Agency participation can occur in various ways, for example, participating fully as a negotiator, or being present as an observer and commentator on possible agency reactions and concerns. Agency representatives in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

2. Negotiations are unlikely to succeed unless all parties, including the agency, are motivated throughout the negotiations by a perception that a negotiated rule would be preferable to a rule developed under traditional processes. To foster this belief, as an incentive to negotiating an agreement, the agency should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency may need to communicate with other participants -- perhaps with the assistance of a mediator or facilitator -- to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement.

3. Agencies should recognize that negotiations can be useful

at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments are received on the notice, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

4. An agency sponsoring a negotiated rulemaking proceeding should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person selected may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator/facilitator is not necessary.

5. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking, should be prepared to address disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator/facilitator to mediate internal issues within a constituency. Agencies should consider the potential for constituency disagreements in choosing representatives, in planning for a successful negotiation, and in selecting persons as mediators or facilitators.

6. Where appropriate, the agency, the mediator/facilitator, or the convenor should consider appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. A similar procedure may also be desirable in to permit neutral technical advice to be given in connection with complex data.

7. Agencies should be mindful of the potential value of providing the parties with an opportunity to participate in training to enhance negotiation skills, before substantive negotiations begin.

8. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs incurred by participants or expended on behalf of the negotiating group. Creation of such a pool from contributions by participants and the agency may be considered in the

pre-negotiation stages of consideration.

9. ACUS should investigate means of resolving intra-party disagreements, with particular attention to difficulties experienced by API in the benzene negotiations, and by ATA in the Flight-and-Duty-Time negotiations.

10. As OSHA pursues its initiative to negotiate an MDA standard, ACUS should monitor the activity to permit detailed comparison with benzene negotiations.

11. ACUS should investigate use of microcomputers for modelling and telecommunications in connection with rule negotiations.

CHAPTER 2

LEGAL AND POLITICAL BACKGROUND

§2.1 History of the Negotiated Rulemaking Idea

Negotiated rulemaking[2] is a process for resolving interest disputes. It is a means of decision making similar to the legislative process. Negotiated rulemaking emerged as a distinct administrative law concept in the late 1970's as a reaction to the unsuitability of notice-and-comment and hybrid rulemaking[3] as a process for resolving the interest disputes involved in most quasi-legislative administrative agency decisions.

New administrative processes arose from increased use of administrative litigation to address problems previously dealt with in markets, through private contractual negotiation,[4] or by elected representatives in legislative assemblies. The increased use of administrative regulation to deal with these problems arose from a combination of increased government intervention to deal with market imperfections[5] and the impracticability of legislative assemblies taking on the resulting burden of decision making themselves.

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[2] "Regulatory negotiation" is a term that refers to use of negotiation in any decisionmaking process by an administrative agency. "Negotiated rulemaking" is a specific application of regulatory negotiation, referring to the use of negotiation in the decisionmaking process associated with rulemaking. This report concentrates on negotiated rule making. The Administrative Conference also sponsors work on other forms of regulatory negotiation. See A.Adams & J.Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector (Jan. 1985) (evaluation of arbitration to settle federal employee appeals).

[3] Terminology is a problem in comparing negotiated rulemaking to more traditional processes. This report uses the term adjudication to refer to an adversarial decision making process in which the parties present their views to the agency by examining witnesses, and qualifying documents through something resembling formal rules of evidence. Hybrid rulemaking is a procedure imposed by statute or by the courts under the Administrative Procedure Act in which adjudicatory procedures are used to some degree in the rulemaking process, though the type of decision-making involved would be termed "rulemaking" and not "adjudication" as those terms are used under the APA. Hybrid rulemaking is discussed more fully in §8.2.

When rules for societal conduct are made in private markets or in representative assemblies, the process of negotiation[6] is relied upon. Negotiation occurs as part of the legislative process in a representative assembly at two levels: first, as a part of the process through which representatives are elected; and second, as a part of the interaction among the representatives in making the compromises necessary to pass a statute. At both levels, no single interest or constituency can get all it wants; each must prioritize its demands, and trade off one for another.[7] There is an incentive for them to find common ground, either to form a majority to elect a favored candidate, or to form a majority to pass desired legislation.

The migration of rulemaking to administrative agencies from markets and legislatures made negotiation more difficult. Agencies make rules because the legislature has left unresolved certain disputes among conflicting interests. But in exercising rulemaking responsibility delegated by the legislature, agencies lack many of the institutional attributes that facilitate accommodation among conflicting interests. For one thing, the accommodation and

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[4] See L.Fuller, The Principles of Social Order 172-187 (1981) (contrasting private negotiation with governmental decision making).

[5] S. Breyer, Regulation and Its Reform 15-35 (1982); J.Dunlop, Dispute Resolution: Negotiation and Consensus Building 4 (1984).

[6] See V.O.Key, Politics, Parties and Pressure Groups 7 (1942) (politics is a struggle among groups or interests); J.Hurst, Dealing With Statutes 19 (1982) (legislature is basically an arena for bargaining); J.Dunlop, Dispute Resolution: Negotiation and Consensus Building 1-22 (1984) (describing and comparing private and political negotiation); Dunlop, The Negotiations Alternative in Dispute Resolution, 29 Vill.L.Rev. 1421 (1984) (describing negotiation process).

[7] See generally Jaffe, The Illusion of the Ideal Administration, 86 Harv.L.Rev. 1183, 1188 (1973) (describing pervasiveness of political compromise in context of administrative regulation).

compromise which result from the election of representatives is missing,[8] and thus agencies must deal with a broad range of atomistic interests[9] rather than benefiting from some subordinate aggregation, as is the case with a legislative assembly. For another, there is no assurance that even a multi-member agency represents the major conflicting interests on any issue before it. Thus the framework for the second stage of accommodation which is typical of a legislative institution also may be lacking.

Clearly, the legislative delegation of details to specialized agencies arose out of necessity; life has become too complex and regulation too pervasive for any legislative assembly to deal in detail with every problem. But this necessity brings with it another. Because an administrative agency lacks the institutional attributes which make private accommodation an integral part of a legislative process, it must find other ways to strike a balance between competing views in developing a rule which will be reasonably satisfactory to those bound by it. In addition, of course, the agency is obligated by law to pursue statutory objectives regardless of what affected interests think. Agencies can search for accommodation only consistent with their statutory mandates.

The conceptual basis of administrative law has shifted in recent years, in searching for ways to facilitate accommodation of conflicting interests.[10] Original administrative law models emphasized judicial review to keep agencies within statutory bounds, and decisional procedures designed to promote the accuracy, rationality, and reviewability of agency decisions.[11] Increasingly, in recent years, administrative law has served to provide a surrogate political process to ensure the fair representation of a wide range of affected interests in the administrative decision-making process.[12] The conceptual shift was motivated by a growing recognition that administrative procedures modelled on judicial processes do not fit the needs of administrative rulemaking. The main problem with this shift of conceptual foundation is that the procedures available to agencies largely have remained static -- designed around the original conceptual models, and ill suited for a "surrogate political process."

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[8] Of course some degree of accommodation occurs in connection with appointment of administrative agency policy personnel, and in legislative oversight of agency functioning. Nevertheless, agencies are accountable to the public only indirectly, and are subject to political forces only when the press or the public takes an interest in an issue before an agency, or through occasional intervention by the legislature or the executive.

[9] The breadth of the interests with which an agency must deal is a function of the type of program for which an agency is responsible. See §2.5.

[10] Stewart, The Reformation of American Administrative Law, 88 Harv.L.Rev. 1667 (1975).

[11] 88 Harv.L.Rev. at 1670.

A major part of the mismatch between administrative procedure and the decisionmaking requirements of delegated legislative power arose from the failure to distinguish "rights disputes" from "interest disputes."[13] Adjudication is designed only to deal with rights disputes.[14] Rights disputes involve application of pre-existing legal standards or "rules of decision" to facts determined by the adjudicator. This is what the adjudicatory process, modelled on a judicial trial, is designed to accomplish. Interest disputes, in contrast, are characterized by the absence of pre-existing rules for decision. Resolution of interest disputes requires that the disputing parties work out the rules according to an accommodation of their interests. While the political process and private contractual negotiation are well suited to resolving interest disputes, the adjudicatory process is ill suited for such disputes.[15] Nevertheless, adjudicatory procedures were superimposed on the rulemaking process.[16]

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[12] 88 Harv.L.Rev. at 1670. See also Jaffe, The Illusion of the Ideal Administration, 86 Harv.L.Rev. 1183, 1184, 1188 (1973) (criticizing model based on assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).

[13] See Perritt, And the Whole Earth Was of One Language: A Broad View of Dispute Resolution, 29 Vill.L.Rev. 1221-29 (1984).

[14] See Fuller, The Forms and Limits of Adjudication, 92 Harv.L.Rev. 353, 369 (1978).

[15] Fuller at 308.

[16] See §8.2 regarding hybrid rulemaking. The point is not that APA "adjudication", under §§556 and 557, is used in rulemaking; but rather than certain trial type procedures associated with adjudication have been superimposed on information rulemaking conducted under APA §553.

As agencies were delegated more responsibility for legislating, the need for a process suited for dealing with interest disputes increased.[17]

Conceptual development of new administrative processes accelerated in the 1970's. Harvard law professor Richard B. Stewart, writing in 1975, considered some of the alternative procedures available to agencies given responsibility for a surrogate political process.[18] He concluded that all of the obvious possibilities for application within traditional procedural frameworks were seriously flawed.[19] He observed that agencies themselves are likely to afford certain interests disproportionate influence, and that the courts are ill suited to force an alteration in the balance of interests.[20]

This led Stewart to explore more "explicitly political" mechanisms for interest representation:[21]

> Since in the absence of authoritative rules of decision, the resolution of the conflicting claims of a large number of competing interests is essentially a political process, a solution to the problems raised by the transformation of administrative law into a system of interest representation might better be achieved by a more direct and explicitly political scheme for securing the representation of all relevant interests affected by administrative decisionmaking. . . . Policy would result from a process of bargaining among the representatives of affected interests.[22]

Stewart considered two ways of achieving this: the regular popular election of agency members, or their appointment for specified terms by private organizations designated by Congress.[23] He concluded that neither alternative had any real prospect of being adopted in the foreseeable future.[24]

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[17] See ; Harter, Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship, 29 Vill.L.Rev. 1393 (1984).
[18] 88 Harv.L.Rev. at 1760-1789.
[19] id.
[20] Id. at 1789-90.
[21] 88 Harv.L.Rev. at 1790.
[22] 88 Harv.L.Rev. at 1790.
[23] 88 Harv.L.Rev. at 1790.

At about the time that Stewart's article appeared, academic and policy currents converged, identifying negotiation as a process that should be examined as an alternative to adjudicatory litigation in making administrative rules. The policy currents were much influenced by John T. Dunlop, Secretary of Labor from 1974-75, and before that, head of the Nixon wage-and-price-controls program. Mr. Dunlop had a distinguished background as a professor of economics and dean of the faculty of arts and sciences at Harvard, labor mediator, and advisor of Presidents on national labor-management policy. As much as anyone in the United States at the time, he was expert on the process of negotiation as a means of resolving workplace disputes. As director of wage-price controls, he administered an extremely broad delegation of rulemaking authority from Congress,[25] which struggled to conform to restrictions traditionally imposed by administrative law. As Secretary of Labor, Mr. Dunlop had responsibility for some 134 regulatory programs, ranging from administration of the Occupational Safety and Health Act to promotion of non-discrimination by federal contractors.

Secretary Dunlop set a high priority on finding new ways to address hotly disputed issues within the jurisdiction of these regulatory agencies. Within the Labor Department, he established a Secretary's Committee on Regulation, chaired by the author of this report, then serving as Deputy Under Secretary of Labor. Before Secretary Dunlop left office, he authored a paper, "The Limits of Legal Compulsion," which he distributed to the President, White House staff personnel concerned with developing regulatory reform ideas, and Labor Department policy officials. The paper ultimately was published in several journals.[26]

The paper began with an invitation to compare "essentially private methods for rule-making within a broad and general governmental context -- exemplified by collective bargaining -- and the more intensive approach of governmental promulgation of mandatory regulations." After identifying eleven problems with the existing approach to regulation, the paper suggested that "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations."

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[24] 88 Harv.L.Rev. at 1791.

[25] See Meatcutters v. Connally, 337 F.Supp. 737 (D.D.C. 1971) (finding broad delegation constitutional).

[26] See Dunlop, The Limits of Legal Compulsion, 27 Lab.L.J. 67 (1976).

The paper offered as a useful example the method used by Dunlop to implement §13(c) of the Urban Mass Transportation Act, which precluded distribution of certain mass transit subsidy funds until the Secretary of Labor certified that employees would not be affected adversely by the federally funded activities:

> Rather than prepare regulations, the Department brought together union and transit representatives and got them to prepare a three year agreement as to what protection employees should receive as a consequence of the federally funded activities. The Department mediated and provided technical assistance, helping to create the standards to apply to individual cases presented to it.

Mr. Dunlop also sought to mediate an agreement between the United Steelworkers and the Steel Industry on a health standard for coke oven emissions.[27]

During his tenure as Secretary, Dunlop also sought to promote greater consideration of the negotiation alternative in the academic community. He directed the author to establish liaison with professors of law and political science, and with former government policy makers who might have an interest in the concept. At one point, Dunlop invited Professor Stewart, Professor James Q. Wilson, William Ruckelshaus, past and future Administrator of the Environmental Protection Agency, and a handful of others to discuss alternatives to traditional rulemaking in an informal seminar. During this period, Philip J. Harter was detailed from the staff of the Administrative Conference to the Council of Economic Advisers to work with Joseph L. Kirk, director of policy analysis for OSHA, to examine alternatives to traditional administrative processes.[28]

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[27] The coke oven standard is discussed in greater detail in §6.2.

[28] May 18, 1976 memorandum from Paul W. MacAvoy to Executive Committee, Economic Policy Board.

After Dunlop resigned as Secretary of Labor in February, 1976, his successor, W. J. Usery, Jr., encouraged the author and Under Secretary Michael Moskow to continue the regulatory reform effort. Mr. Usery strengthened the Secretary's Committee on Regulation, increasing the involvement of the Under Secretary. With Usery's support the Department sponsored Ph.D research by Lawrence Bacow, resulting in the publication of a study[29] of how safety and health standards had been addressed through collective bargaining in the automobile and other industries. Bacow went on to play a central role in the drafting and implementation of the Massachusetts Hazardous Waste Facility Siting Act,[30] which provides a statutory framework for negotiations between local communities and developers of waste disposal sites in that state.

The Department of Labor also provided seed money for an interdisciplinary effort at Harvard University, which subsequently developed into the Harvard Negotiation Project. The first executive director of the Harvard effort was William Drayton, who was Associate Administrator of the Environmental Protection Agency in the Carter Administration. Nell Minow, an EPA attorney who worked with Drayton, subsequently helped Harter formulate the ACUS negotiated rulemaking recommendations.

Thus were seeds planted at the Administrative Conference, Department of Labor and at EPA for the negotiated rulemaking idea. Bacow, Drayton, Harter, Ruckelshaus and Stewart all played major roles in refining the negotiation concept.

The Dunlop ideas required more conceptual development before they were practicable. Professor Stewart stated the problem this way in 1976, commenting on the Limits of Legal Compulsion:

> I am very skeptical as to whether the collective bargaining type of alternative suggested will really work in very many areas. Most types of

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[29] L. Bacow, Negotiating Health and Safety (1976). Mr. Bacow is now on the faculty of the Massachusetts Institute of Technology.

[30] Mass.Gen.Laws Ann. ch.21D, §§12-15 (West 1981). See Bacow & Milkey, Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach., 6 Harv.Envt'l L.Rev. 265 (1982).

> governmental regulation definitely do not involve the situation which characterizes collective bargaining -- two more or less well-recognized groups with a mutual interest in a negotiated compromise (as well as objectives that conflict in part). Much governmental regulation is designed to protect loosely scattered, disorganized interests held by individuals -- such as those of consumers or persons concerned with environmental quality. Normally these interests do not have authoritative spokesmen who are in a position to reach binding compromise agreements with the regulated Industry on matters of policy.[31] The only leverage which such disorganized interests often have (apart from seeking champions and publicity in the legislature) is to attempt to goad the agency into action on their behalf and, failing administrative protection, recourse to the judiciary. The "legal game-playing" [a phrase used in the Dunlop paper] may be an important and perhaps necessary tool enabling interests to protect themselves, and I am very unclear as to how the collective bargaining model could be applied in such situations.[32]

The Dunlop idea of using negotiation as a regulatory procedure responded to Stewart's exploration of explicitly political processes. It was another means of permitting political bargaining not considered explicitly in Stewart's article. Yet the negotiation idea presented difficulties, especially with respect to the representation process.

These difficulties were addressed by Philip J. Harter, under ACUS sponsorship, after his experience in examining OSHA as part of the Economic Policy Board task force. Harter was motivated to define the regulatory negotiation idea further because he thought discussions of the negotiation process at the Department of Labor after Dunlop, Usery, Moskow and Perritt left, and in Congressional hearings,[33] failed to give sufficient attention to the relationship between negotiation and the Administrative Procedure Act.

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[31] Referring to the absence of institutional mechanisms for interest aggregation. See §2.4.

[32] March 10, 1976 letter from Richard B. Stewart to Henry H. Perritt, Jr.

[33] See Hearing on H.R. 746, Regulatory Procedure Act of 1981, Before the Subcomm. on Admin. Law and Governmental Relations of the

Harter wrote a law review article,[34] in which he carried the Dunlop concept further, addressing some of the concerns raised by Stewart's letter. Harter reviewed developments leading to Stewart's conclusion that the interest representation model had supplanted the traditional model of administrative law.[35] Harter concentrated on procedural issues, noting that, under the "hybrid rulemaking" concept,[36] agencies had become umpires, bound by the "record." Under this concept, the rulemaking record was the vehicle of ultimate interest group control over agency decision.[37] But the record-generating procedures focus on facts, while theoretically reserving to the agency the unilateral right to make policy.[38] Adjudicatory procedures for developing a record in hybrid rulemaking do not permit direct interest group interaction on policy issues.

The procedural inadequacy of hybrid rulemaking led Harter to focus on practical alternatives to the fact-oriented adjudicatory procedure. He found examples of such alternatives in the Consumer Product Safety Commission "offeror process;" the National Institute of Building Sciences; innovations by Secretary Dunlop; ad-hoc efforts involving dam-building and uranium mine siting controversies; sequential negotiations frequently involved in formulating Notices of Proposed Rulemaking; occupational safety and health consensus standards developed by private groups; the National Coal Policy Project; site-specific environmental negotiation; and negotiated settlements of lawsuits challenging EPA regulatory decisions.[39]

House Comm. on the Judiciary, 97th Con., 1st Sess. 683-84 (testimony of C. Boyden Gray, Counsel to the Vice President, advocating meetings between agencies and affected interests as part of rulemaking process), cited in Harter, 71 Geo.L.J. at 28 n.158.

[34] Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo.L.J. 1 (1982).

[35] 71 Geo.L.J. at 1-11.

[36] See generally S.Breyer & R.Stewart, Administrative Law and Regulatory Policy 592-607 (2d ed. 1985).

[37] 71 Geo.L.J. at 14.

[38] 71 Geo.L.J. at 16.

[39] 71 Geo.L.J. at 25-42. He might also have noted negotiations within "rate bureaus" under the Interstate Commerce Act, and

He sought to synthesize criteria from these examples for processes Stewart presumably would acknowledge as "explicitly political."[40] Such criteria could be used in generalizing the use of "explicitly political" processes to improve administrative agency decision making.

Formulation of ACUS Recommendation 82-4 proceeded contemporaneously with Harter's writing of his article. The ACUS committee charged with reviewing the proposed recommendation was well balanced, including as it did, a member of the Sierra Club board of directors, a representative of Consumers Union, the general counsel of Monsanto, and a policy official of EPA. Agency interest in the subject matter of the recommendation was intensified by the introduction of S.1601 by Senator Roth[41] at the time the recommendation was being considered. S.1601 was circulated to federal agencies for their comment through the regular OMB legislative clearance process. The necessity of formulating a position on S.1601 undoubtedly heightened agency interest in the negotiated rulemaking concept.

Recommendation 82-4 was adopted by ACUS with little controversy, boosted by strong support expressed by Vice President Bush in a speech before the Conference. The recommendation suggests that:

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the Federal Railroad Administration's experience with air brake regulations. In 1982, the Federal Railroad Administration amended rules pertaining to railroad air brakes. The specific changes adopted resulted from an NPRM adopted at the joint request of the Association of American Railroads, the main industry trade association,and the Railway Labor Executives Association, a confederation of labor organizations representing rail employees. 47 Fed.Reg. 36792 (Aug. 23, 1982). Comments submitted in response to the NPRM generally were supportive, resulting in a final rule reflecting the labor-industry agreement. 47 Fed.Reg. 36792 (Aug. 23, 1982).

[40] 71 Geo.L.J. at 42-61.

[41] S.1601, 97th Cong., 1st Sess. (introduced by Sen.Roth, Sept. 9, 1981). Harter drafted the bill, in response to a request from the Senator's staff. Senator Roth apparently was motivated to introduce S.1601 by his desire to illustrate an alternative to the regulatory reform proposals then under consideration in the Congress. Most of the other proposals concentrated on making rulemaking more adjudicatory in character.

> Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.[42]

Experience in the four efforts reviewed in this report has shown that "Negotiated Rulemaking" is a practical alternative to Notice-and-Comment or Hybrid Rulemaking, and that Recommendation 82-4 is basically sound. Some parts of the recommendation need amplification, however.

§2.2 Theoretical Foundation

Evaluation of the negotiated rulemaking concept in practice requires consideration of the characteristics of the negotiation process, of interest groups, and of regulatory programs. Each type of consideration is addressed in the sections that follow.

§2.3 -- Dynamics of Regulatory Negotiation

Notwithstanding efforts to impose adjudicatory procedures for the formulation of regulatory policy, regulatory program decisions are made in a political environment.[43] The statutory framework of any program is as much a function of the political process which shaped it as it is a function of objective economic or scientific . In developing and pursuing a regulatory strategy within such a statutory framework, an administrator is unlikely to pursue a strategy which he knows will enrage those groups most influential in the Congress, with the press, or with his superiors in the Executive Branch, regardless of what "rational" analysis says about the merits of various options.

Regulatory negotiations are but one mechanism within which political accommodation can occur. Negotiation will succeed only when persons able to use other processes have an incentive to participate in negotiations and to reach negotiated agreement. "Participation" and "agreement" necessarily take place through intermediaries. Incentives operate at several different levels: at the level of the "negotiation" itself, and at lower levels, where intra-group negotiations within constituencies are necessary to produce party positions. The best way to understand incentives to negotiate is to consider first, the viewpoint of a hypothetical, monolithic party. Having described the incentives for such a hypothetical party, one then can overlay complications that influence real-world regulatory negotiations, especially complications instinct in intra-group interest aggregation.

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[42] 47 Fed.Reg. 30708, 30709 (1982).

[43] See generally Jaffe, The Illusion of the Ideal Administration, 86 Harv.L.Rev. 1183, 1188 (1973) (describing pervasiveness of political compromise in context of administrative regulation).

A useful conceptual structure for understanding incentives to negotiate is the one offered by Professors Fisher and Ury in their popular book on the negotiation process.[44] They explain that the participation of any party to a negotiation will be guided by that party's "Best Alternative to Negotiated Agreement" ("BATNA"). If a party's BATNA is superior to what can be obtained in negotiation, the party will not participate. A participant will not agree to an outcome worse than its BATNA.

Some simple examples are useful. If I am considering buying a car from you, and know that I can get the identical car from your competitor across the street for $10,000, I will negotiate with you only if I think our negotiations may produce agreement on a price less than $10,000. The $10,000 is my BATNA. Or, if I am a plaintiff in a personal injury lawsuit, and the expected net value[45] of a jury verdict to me is $25,000, I will negotiate a settlement with you, the defendant, only if the settlement is worth more to me than $25,000. My BATNA in these negotiations is $25,000.

For potential participants in a regulatory negotiation, BATNA's are determined by perceptions of what the agency will do in the absence of a negotiation.[46] A rational, monolithic party will participate in regulatory negotiation only if it perceives the negotiation outcome to be superior to it than its BATNA, determined by its estimate of probable unilateral agency action. Different parties are likely to have different BATNA's because they predict the unilateral agency outcome differently, or because they have different cost or utility functions against which they measure the impact of agency action.

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[44] R.Fisher & W.Ury, Getting to Yes (1981).

[45] Litigation expenses, including the cost of possible appeals, must be subtracted from the gross amount of the expected verdict, and the time-value of money must be taken into account through an appropriate "discount rate."

[46] What the agency will do will be affected by what courts, the President, and the Congress will do. So perceptions of these influences is important also.

Consider, for example a hypothetical federal agency with authority to set affirmative action "goals and timetables" for contractors.[47] Groups interested in the content of such goals and timetables will be motivated to negotiate with each other only if they think they will not like what the agency will do on its own.

Suppose, for example, that OMB, pursuing the President's program, wishes the agency to adopt relatively relaxed goals and timetables. Certain minority groups want much more ambitious goals and much tighter deadlines for achieving them because it will mean more employment opportunities in the short term for their constituents. Contractor associations prefer the OMB position, because ambitious goals and timetables will increase labor costs.

If the minority groups believe one or more of three things, they have little incentive to facilitate negotiations over the goals and timetables: (1) the agency lacks the legal authority to relax goals and timetable, and a court will enjoin any relaxation; (2) the Congress will block appropriations for programs administered by the agency if goals and timetables are relaxed; or (3) the minority groups have substantial direct influence with agency decision makers and OMB is not likely to make much of an issue of the matter.

If any of these circumstances obtain, as perceived by the minority groups, their BATNA is attractive. On the other hand, if the minority groups believe that successful litigation is unlikely or very expensive, if Congress does not care much about the subject, and OMB cares a great deal, their BATNA is less favorable and they have a stronger incentive to work something out through negotiations. The contractor groups are, of course in the converse position.

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[47] The example is similar to the one considered by a former student of mine, Robert L. Sachs, Jr. See Comment, An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations, 29 Vill.L.Rev. 1505 (1984).

The BATNA-determined participation incentive is not invariant; it likely will change over time for each party, as the party gets additional information about the agency's intentions. Even more important, other negotiators, neutral mediators or convenors, and the agency itself can influence party BATNAs, and hence party incentives to negotiate and to agree.

The most appropriate analogy to a regulatory negotiation is not a traditional labor-management negotiation, where BATNAs are determined by each party's assessment of his opponent's ability to inflict injury or to offer rewards. Rather the appropriate analogy is to civil litigation settlement negotiation in which party predictions of what a non-party, the judge or jury, will do determine BATNAs. In regulatory negotiations, as in settlement negotiations, the third party decision maker can influence party perception of likely outcome in the absence of a negotiated settlement. In other words, the agency or judge changes BATNA's by what she says about her intentions.

This model suggests that regulatory negotiations are most likely to be successful when the agency (or some other credible source) persuades each potential participant that unilateral agency action has undesirable consequences for that potential participant. Lower BATNAs mean greater incentives to negotiate a solution.

This part of the analysis yields the first hypothesis for effective regulatory negotiation: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse for them than what is attainable in the negotiation. The hypothesis has three corollaries: (1) regulatory negotiations are more likely to be successful if the parties agree on what the outcome will be in the absence of negotiations,[48] or, if they disagree, if they are all pessimistic rather than optimistic; (2) regulatory negotiations are more likely to be successful if the agency actively influences party perceptions of BATNA's, emphasizing to each party the undesirable consequences of unilateral agency action in terms relevant to each party.

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[48] See Perritt, And the Whole Earth Was of One Language: A Broad View of Dispute Resolution, 29 Vill.L.Rev. 1221, 1256 (1984).

This analysis of BATNA-driven choices about participation has assumed so far that parties are monolithic: that parties affected by regulatory decision-making behave like rational individuals dealing with a single estimate of risk. Real parties do not behave this way. Real parties are represented by individual human beings, but the individuals express the views of a group of constituents who usually have divergent views. The relations within constituency groups and between constituency groups and individual negotiators complicate the regulatory negotiation dynamics.

Experienced mediators know that three agreements are really involved in any successful two-party negotiation: (1) an agreement between negotiator A and his constituents, (2) an agreement between negotiator B and her constituents, and (3) an agreement between negotiators A and B.[49] Agreements (1) and (2) can be called "intraparty agreements." Frequently the most difficult mediation job involves achieving the intra-constituency agreements rather than achieving the negotiator-negotiator agreement.

The intra-constituency problem is more difficult in regulatory negotiations than in labor negotiations, because the "parties" to regulation negotiation are likely to be ad-hoc groups or coalitions without formal processes worked out for internal decision making. Ordinarily in regulatory negotiation, there is no equivalent of the "exclusive representation" principle from the law of collective bargaining[50] available to bind constituents to the position taken by or agreed to by an industry representative. At any point an individual constituency may disavow its putative representative in the negotiations, take its own position on matters under negotiation, present formal positions to the agency inconsistent with positions taken by its "representative," or sue to have the negotiated rule set aside by the courts. Some risk of this occurring probably is inevitable, but regulatory negotiation cannot be successful unless a way can be found practically to force as many of these potential intra-constituency disagreements among similarly situated regulatees to be resolved through a representation process in the negotiations rather than outside the negotiations.

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[49] Dunlop, 29 Vill.L.Rev. at 1433 (referring to the need for three agreements to conclude a negotiation).

[50] See §9(a), National Labor Relations Act, 29 U.S.C. §159(a) (1982) (exclusive representative); §2, Ninth, Railway Labor Act, 45 U.S.C. §152, Ninth (1982) (same).

Extreme positions by trade groups reduce intra-constituency differences, but make negotiations more difficult. When representatives must make compromises at the bargaining table, the intra-constituency problem becomes worse.

It is important for someone involved in the negotiation process, either the representatives themselves, the mediator/convenors, or the agency personnel, to be adroit at diagnosing intra-constituency problems and working creatively to facilitate intra-constituency agreement. Someone familiar with the internal structure and decision processes of institutions, such as labor unions, corporations and public interest groups involved in a particular negotiation, can be invaluable. Even more valuable would be a mediator who already knows the key decision makers within a particular constituency, and thus is trusted to some degree by them.

Individual group representatives in regulatory negotiations incur personal risk by participating and greater personal risk by reaching agreement. This is true of trade union officials or staff, trade association staff, employees of individual corporations, and public interest representatives. If any one of these party representatives sits down with an adversary and agrees on a regulation, the party representative is responsible in some measure for the regulation. If, on the other hand, the same party representative presents positions in the traditional administrative and judicial processes, the representative is not responsible for the outcome to the same degree; the decisionmaker -- agency or judge -- can be blamed, and the representative can point to the purity of his or her advocacy as proof of aggressive pursuit of constituency objectives.

Personal risk is especially high for staff representatives of a trade association or labor organization whose commitment to constituency principles may be suspect. Such representatives may feel the need to be especially militant and uncompromising to prove their loyalty to the "cause." In contrast, representatives with an independent power base, such as senior corporate executives or elected trade union officers, may feel freer to be innovative.

Personal risk is a difficult problem to deal with; it always will remain in the background as a continuing bias against meaningful regulatory negotiation. The best that can happen is that other participants, mediator/convenors, and the agency, must recognize the source of the risk, and be alert to opportunities to reduce the risk of participation, compared with the risk of non-participation, on an ad-hoc basis for each individual representative. As the undesirable consequences of unilateral agency action are communicated to constituents of representatives, the relative risk of participation is reduced. Periodic constituency meetings may be desirable,[51] and full reporting to constituents as negotiations proceed is essential.

Also, selecting negotiators with strong power bases can serve to permit freer exploration of compromises.

In addition, it is important that give and take among negotiation participants be shielded from publicity. The danger of publicity is that constituents can become alarmed by fragmentary or inaccurate reports of positions taken or compromises considered by their representatives, thus endangering the minimum level of constituent support necessary to make the participation of any representative meaningful.

The choice between open and closed meetings among negotiators, however, also bears on the relative power of different kinds of interest representatives. Public interest groups frequently make up for small financial and staff resources by mobilizing the press, and through the press, public and Congressional opinion. It is easier to accomplish this mobilization when the deliberations of the negotiating group are visible to the press. It is hard to do when the meetings not only are closed to the public, but also when the negotiators pledge non-disclosure to each other. Thus the legal requirement that meetings be open may result in a subtle enhancement of public interest group power, even when no outsider comes to the meetings or tries to publicize committee activities. More generally, open meetings benefit groups possessing less influence with agency decisionmakers. Thus the decision whether or not to open negotiation to public scrutiny bears on the question of who gets to be included in formulating agency policy.

§2.4 -- Characteristics of Interest Groups

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[51] This occurred with API and ATA in the benzene and flight-and-duty-time negotiations, for example.

Political decisions in a complex society are made primarily by the interaction of interest groups.[52] James Madison recognized this when he wrote major portions of the United States Constitution.[53] Legislative action occurs when the balance of political power favors change.[54] The balance of political power generally is determined by the strength and intensity of feeling of groups within the larger society perceiving that they have similar interests on a particular subject.[55]

Interest groups play an essential role in the politics of a modern state. The level of governmental influence on virtually all aspects of life gives virtually every individual citizen a substantial stake in one or more public policies. Yet a typical individual is poorly positioned to exercise much influence over policy because she lacks power, and because transaction costs are high.[56] At the same time, each individual is concerned personally with only a minuscule portion of the total range of public policy issues. The diversity of citizen concerns within geographic representative districts makes it difficult for elected representatives in legislatures to accomplish the interest aggregation[57] functions by themselves.[58] The result is that interest groups arise to provide economies of scale in the exercise of power, and to permit individual concerns about particular issues to be focussed within representative institutions.[59]

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[52] V.O.Key Politics, Parties and Pressure Groups 7 (1942) (politics is a struggle among groups or interests).

[53] See The Federalist No. 10 (J.Madison).

[54] V.O.Key, Politics, Parties and Pressure Groups 7-8 (1942).

[55] See generally J.Hurst, Dealing With Statutes 1-29 (1982). Professor Hurst discusses the limitations that resources, diffusion of interest, and other factors may present in obtaining legislative response. Fundamentally, he suggests, legislatures are institutions that provide broad arenas for bargaining among diverse interests. Id. at 19. Most people interest themselves, however, in the legislative process only when a matter under consideration has material importance for them. Id. at 23.

[56] V.O.Key, Politics, Parties & Pressure Groups 201 (1942).

[57] "Interest aggregation" refers to the process of synthesizing from apparently diverse interests, a single position that can receive support from adherents of the diverse interests.

[58] Key at 202.

The proposition that policy decisions are made by group interaction raises both macro- and micro- issues. The macro issues relate to the interaction among groups. The micro issues relating to interaction within groups.

The macro issues were ones that concerned Madison. They raise questions of group power, issue maturity and intensity of feeling. One commentator, who made a study of the decision to land on the moon, has drawn the following general conclusion about issue maturity:

> the objective must have been the subject of sufficient political debate so that the groups interested in it and opposed to it can be identified, their positions and relative strengths evaluated, and potential sources of support have time to develop.[60]

Issue maturity plays an important role in the development of how intensely different groups feel about a particular issue and how strongly they prefer different alternatives. Issue maturity also, of course, ensures that a range of alternatives have been formulated for consideration.

Intensity of feeling is an important variable in the calculus of public opinion.[61] The influence of a particular group or faction, which, combined with the influence of other groups of factions, determines popular will, are functions of numerosity and intensity of feeling.[62] Transaction costs prevent a plebiscite on every public policy alternative, and reduce the desire of interest groups to have such involvement in the full range of political decisions.[63] In other words, the cost-benefit ratio of participation in policy formulation is unfavorable when a potential participant is indifferent to outcome.[64]

Micro-analysis of interest groups focuses on the

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[59] Key at 203 (referring to representation function performed by interest groups).
[60] Logsdon at ___.
[61] Robert A. Dahl, A Preface to Democratic Theory 50 (1956).
[62] Dahl at 38.
[63] Dahl at 44.
[64] Dahl at 42-43.

representation, or interest aggregating function, that interest groups perform.[65] It also permits consideration of the ways in which interest groups function to intensify member interest in particular issues, to formulate concrete alternatives, and to articulate member positions.[66]

Interest groups have overcome the fragmentation, transaction-cost, and free-rider difficulties impeding group action through "organizational entrepreneurship."[67] Especially when the issues involved are complicated, group members may defer almost entirely to the decisions of group representatives. This deference can make negotiations involving such representatives more fruitful. Trade unions or trade union federations dealing with complex technical regulatory disputes are an example of this phenomenon. The level of awareness of rank-and-file members of the technical issues is low, and the members of such organizations tend to defer to a handful of staff experts.

On the other hand, some public interest groups may prefer short term litigation victories to negotiation because the greater publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund-raising and other facets of membership support. Such groups tend to be less risk averse than business groups, and therefore may prefer the all-or-nothing characteristic of litigation rather than accommodation.[68] In addition to lower risk aversion, public interest groups and trade unions may perceive that adversarial procedures better compensate for scarce technical resources than negotiation.[69] Careful selection of test cases in court permits scarce resources to be targeted on key legal victories rather than being dissipated on complex factual disputes.[70]

These are only tendencies of public interest groups. Obviously the most effective consumer groups do more than litigate; many participate regularly in the legislative process, where negotiation and accommodation always are involved. Also, the consumer groups involved in the negotiated rulemaking efforts addressed in this report participated in good faith. In the case of the FAA negotiations, the Aviation Consumer Action Project dismissed a lawsuit against the FAA once it appeared to ACAP that the FAA was serious in acting and that negotiation would lead to a rule faster than pursuing litigation, which would have resulted at most in an order to the agency to promulgate a rule by a date certain.

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[65] Key at 203.

[66] Key at 203-204.

[67] Stewart at 23.

[68] Stewart at 25-26.

[69] This perception existed in the benzene negotiations. See §3.15.

[70] Of course the costs of trying a complex factual issue on remand to the agency may be high, after a victory in the appellate courts.

Because large firms are more risk adverse than small firms or organizational entrepreneurs, a negotiated resolution of a regulatory dispute is likely to be more attractive to interest groups dominated by a few large firms than to public interest groups or other groups with more fragmented membership.[71] But negotiation, while attractive, may be more difficult because the large constituents have the resources to develop idiosyncratic positions and priorities, making intra-group compromise more difficult than it is in groups in which constituents defer to their representatives.

§2.5 -- Characteristics of Regulatory Programs

Interest groups interact with regulatory programs. Indeed interest groups arose in part because of increased government regulation.[72] The nature of the interaction is determined in part by the nature of the regulatory program, because the nature of the regulation determines the likely intensity of interest group feeling on regulatory issues.[73]

Professor James Q. Wilson offers a classification of regulatory programs based on the incidence of costs and benefits likely to influence intensity of group feeling.[74] He suggests that programs fall into three categories. Programs in Wilson's first category concentrate their benefits on a small group and distribute their costs over wide sectors of the population. Economic regulation of railroads and airlines, milk prices and taxicabs fall into this category.

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[71] Stewart at 23.

[72] Key at 201-202.

[73] The role of intensity in political interaction is summarized in the preceding section.

[74] See Wilson The Politics of Regulation, The Politics of Regulation 357, 366-67 (J.Wilson, ed. 1980).

Programs in Wilson's second category concentrate both benefits and costs. Regulatory programs relating to labor-management relations fall into this category; Labor or Management benefits at the expense of the other.

Wilson's third category encompasses most recent consumer and environmental protection and health and safety regulation. Here, benefits are diffused over large parts of the population and costs are concentrated on relatively narrow sectors. As Wilson points out, the development of policy is particularly difficult with respect to the third category of regulation because the number of transactions subject to the regulation is likely to be far greater than in the first or second categories: a few hundred license applications before the FCC compared with safety and health practices in nine million workplaces.

One can add to Wilson's list a fourth category. This category includes programs whose costs and benefits both are diffused. An example would be automobile emissions device inspection programs.

Programs in Wilson's second category are better candidates for negotiation than programs in the fourth category. This is so because it is easier to mobilize interest representatives for the bargaining process when the interest groups are few in number and narrow in scope. Moreover, programs with narrow impact are less likely to attract intervention by Congress, the press, White House and the public.[75] Between the extremes represented by the second and fourth categories, Wilson's first and third categories present intermediate levels of difficulty in organizing interest representatives for regulatory negotiation.

§2.6 Criteria for Negotiated Rulemaking

ACUS Recommendation 82-4 offers criteria by which to select subjects for negotiated rulemaking. The recommendation was drafted for the conference by Philip J. Harter. Mr. Harter's contemporaneous law review article addresses the same criteria in somewhat greater detail than the recommendation. Harter dissected the negotiation process into six distinct facets:

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[75] See Stewart unpublished manuscript.

1. assembling the negotiators;[76]
2. the negotiations themselves;[77]
3. achieving consensus;[78]
4. the means of reporting consensus to the agency;[79]
5. agency action;[80] and
6. judicial review.[81]

Finally, he articulated a set of nine principles which are embodied almost verbatim in the ACUS Recommendation 82-4.[82]

Harter recognized that people will negotiate only as long as they believe negotiations will resolve their dispute in a manner more favorable to each of them than other dispute resolution techniques.[83] The acceptability of negotiation as a dispute resolution process is determined by relative power.[84] Harter identified four sources of power:[85]

A) The ability to use a set of pre-existing criteria to structure decisionmaking;[86]

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[76] 71 Geo.L.J. at 67-82.
[77] 71 Geo.L.J. at 82-92.
[78] 71 Geo.L.J. at 92-97.
[79] 97-99.
[80] 71 Geo.L.J. at 99-102.
[81] 71 Geo.L.J. at 102-107.
[82] The congruence between the Harter criteria and the ACUS recommendations is not surprising because Harter developed the recommendation under contract to ACUS.
[83] Id. at 42-43.
[84] Harter uses the term "relative power." The idea is the same as the BATNA concept. See §2.3.
[85] Id. at 43-44. In the referenced discussion, Harter talked about the acceptability of any form of dispute resolution. The textual discussion here applies his ideas to the acceptability of negotiation in particular.

B) Availability of some other formal process for decision-making;[87]

C) The ability to gain access to these alternative decisional processes in a way that a party could use its own resources most effectively. A party which has a broad-based public appeal may wish for the decision to be made by public opinion. Another party with access to skilled lawyers may prefer complex judicial proceedings. Access to such alternative forums or processes enhances relative power in a negotiating forum.

D) The power to delay a decision by any of these means.

The relative attractiveness of negotiations will be influenced by these aspects of power.[88] Harter offered the following criteria to define situations where negotiation would be most effective.[89] He stressed that he did not envision mechanical application of the criteria, or satisfaction of every criterion.[90]

1. Countervailing Power.[91] Each party must have power to affect the decisional outcome. This can flow from capacity to influence the legislature, the ability to run an

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[86] See Eisenberg Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv.L.Rev. 637, 639 (1976) (use of precedent in negotiations).

[87] The use of norms does not automatically establish the use of a formal process. Examples are given of "relationships, such as parent-child, union-management,...[which] exhibit features of dependency and/or intimacy that inhibit the parties from seeking resolution through the intervention of a third party" Id. at 44 n.245.

[88] Id. at 44. §2.3 considers in more detail the determinants of whether negotiation is an attractive alternative to a party.

[89] The use of negotiation as a tool for the "produc[tion of] a sound regulation or [for] facilita[tion of] the regulatory process" is stressed. Id.

[90] Id. at 44-45 & n. 250.

[91] Id. at 45-46. This corresponds to Þ4(e) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

effective public relations campaign, substantial litigation resources, or any other way of obtaining an outcome favorable to the party, or inflicting costs on opponents, in another forum. Negotiation will be effective as a decisional process only if no one party has power sufficient to overwhelm the others.[92] Increased power on one side, however, strengthens incentives for opposing sides to seek a negotiated solution.

2. Limited Number of Parties.[93] It is difficult to negotiate when a large number of people and demands must be met and accommodated. "Pure" negotiation[94] as a method for producing a new tax bill, for example, would not work. The number of people whose interests are involved would probably be so large so as to preclude effective communication.[95]

3. Mature Issues.[96] The issues must be readily apparent and the parties must be ready to decide them. If

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[92] For example, negotiation would not effectively resolve a conflict between a power company which seeks to build a dam, town residents which support the power company, and a small group of environmentalists which oppose the dam. The environmentalists would bring little power to the table. If the dispute resolution was carried out in a courtroom or a congressional committee, however, the environmentalists would have the advantage of procedural safeguards. The presence of these safeguards would ensure the protection of their interests -- provided they have sufficient funds or political clout and sophistication.

[93] Id. at 46. This corresponds to Þ4(c) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

[94] By this is meant non-representative negotiation. Each individual represents his or her own interests and all the individuals gather together to negotiate. In fact, however, tax bills are produced by negotiation - by a representative negotiation, in which a few individuals (legislators) represent many interests. Non-representative negotiation is distinguished by the absence of interest aggregation mechanisms.

[95] Fifteen parties is suggested as the "rough practical limit", if for no other reason than "it seems difficult to get more people than that around a table in reasonable comfort." Id. at 46 n. 257.

[96] Id. at 47. This corresponds to Þ4(a) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982). The importance of issue maturity in the political process has been noted by other commentators. See §2.4.

information still needs to be gathered or if the parties are still establishing their positions,[97] negotiation cannot be utilized because no one knows what its position is, or what compromises it is prepared to make. The importance of issue maturity also has been recognized by other students of political behavior.[98] Issue maturity is of some significance even when disputants are individuals: each disputant must have some time to think about her position on a new question or proposal. Issue maturity is far more important when disputants are groups. Constituency positions must be determined, and this requires aggregation and trading off within the group.[99] The more complex the issue, and the more novel the possible solution, the longer it will take for this process to occur.

4. Inevitability of Decision.[100] There must be pressure for resolution of the matter.[101] Effective negotiation requires compromise. Compromise involves making concessions. Most people are reluctant to make concessions until they are forced to do so by the prospect of something unpleasant. Deadline pressure can result from fear that the decision will be taken away from the negotiators.[102]

5. Opportunity for Gain.[103] Negotiation must have the potential to produce gain for all parties. Negotiated solutions to "zero sum games" are difficult to achieve.[104] Effective mediation helps negotiating parties discover alternative formulations and to perceive the true value of their BATNA's,[105] for example, regulations that might be promulgated in the absence of negotiated agreement. The heightened perception of loss in alternative forums may be great enough to overcome any fear about loss through negotiations.[106]

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[97] Examples of this would be lobbying for public support, media support, etc. Id. at 47 & n. 259.

[98] See Logsdon, The Decision to Go to the Moon: Project Apollo and the National Interest 81 (1970).

[99] Id.

[100] Id. at 48. This is addressed in Þ4(a) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

[101] See Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 Vill.L.Rev. 1421, 1436 (1984) (deadline serves a vital function in negotiations).

[102] Id. at 47-48 & n. 263.

[103] Id. at 48-49. This corresponds to Þ4(e) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982). This criterion is not addressed explicitly in ACUS Recommendation 82-4.

[104] Id. at 48 n. 284.

[105] See Dunlop, 29 Vill.L.Rev. at 1444-46; Perritt, *"And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*,

6. Absence of Fundamental Value Conflict.[107] The regulation to be developed cannot involve compromise of deeply held beliefs or values. This would involve costs higher than most parties could tolerate.[108] This criterion does not mean that negotiation cannot be used to resolve minor issues involved in rule controversies in which fundamental values are at stake. Nor does it mean that the *implementation* of regulations developed on a fundamental matter cannot be negotiated.[109]

Moreover, the fundamental value criterion frequently is misunderstood. Merely because substantial costs are involved does not mean that fundamental values are involved. Rather, fundamental values are those having ideological rather than merely economic significance, or perhaps, economic risks of such magnitude that they seriously threaten a party's very survival.

7. Permitting Trade Offs.[110] The negotiation process is an evaluative one. The parties determine what is most important to them and direct their behavior towards accomplishing it. If there is only one issue to resolve, one position to assume, negotiation is unlikely to result in agreement. A situation where there are two or more issues to resolve, however, with the attendant possibilities of gain on one issue offsetting loss on another, is more amenable to negotiation.[111]

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29 Vill.L.Rev. 1221, 1232-1235 (1984). The BATNA concept is explained in §2.3.

[106] Id. at 49.

[107] Id. at 49-50. This corresponds to ¶4(b) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

[108] For example, the establishment of a public school curriculum through negotiation would be difficult if the only participants were a fundamentalist Baptist preacher and an equally committed evolutionist.

[109] Id.

[110] Id. at 50. This corresponds to ¶4(d) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

[111] Id. at 50, n. 274.

8. Research Not Determinative of Outcome.[112] Resolution of a dispute should not depend on research results. The parties may be unwilling to formulate or compromise positions in the face of scientific uncertainty. Research results might produce a clear victory for one interest.[113] But even if a clear win or loss might result from the research findings, the parties still might choose to negotiate parallel or peripheral issues.[114] Also, the parties might negotiate issues to be researched and the way in which the research should be conducted.

9. Agreement Implementation.[115] Some kind of effective implementation process must be present. Lack of an implementation process would destroy the core prerequisite negotiation: the parties' belief that their own interests will be furthered by negotiating.

Harter recognized implicitly two forms of negotiated rulemaking, one in which the agency participates in the negotiations, and another in which it does not.[116] The same two variants had been addressed more explicitly in a Harvard Law Review note published at about the same time.[117]

The objective of negotiated rulemaking is to reach "consensus" among the participants as to the content of the proposed rule. Harter characterized the definition of "consensus" as "one of the most difficult and complex questions in regulatory negotiation."[118] He concluded that experience was necessary before anyone could develop more concrete ideas on what consensus should entail, pointing out, however, that the existence of a consensus is more a matter of feel, than of mathematical calculation.[119] The Harter formulation necessarily omitted detailed formulation of the conditions conducive to closure on an agreement.[120]

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[112] Id. at 50-51. This criterion is not addressed explicitly in ACUS Recommendation 82-4.

[113] See Perritt, And the Whole Earth Was of One Language: A Broad View of Disputes Resolution, 29 Vill.L.Rev. 1221, 1253-56 (1984) (explaining how similar perceptions of probably outcomes make negotiated resolution more likely). Uncertainty can improve the attractiveness of negotiated resolution to risk-averse parties, but similar predictions of outcome probably are more important. Id.

[114] Id. at 51, n. 276.

[115] Id. at 51. This criterion is addressed in part by ÞÞ13 and 14 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30710 (1982), proposing publication of a negotiated rule in the Federal Register, and giving the negotiators an opportunity to review comments submitted by non participants.

[116] 71 Geo.L.J. at 57-58.

[117] See Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv.L.Rev. 1871, 1875-76 (1981) (distinguishing between "Agency Oversight Model," in which agency does not participate, and "Agency Participation Model," in which it does).

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[118] 71 Geo.L.J. at 92.

[119] 71 Geo.L.J. at 93.

[120] Paragraph 11 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30710 (1982), addressed consensus in very general terms: "Consensus . . . means that each interest represented in the negotiating groups concurs in the result, unless all members of the group agrees at the outset on another definition." That paragraph contemplated however, that the negotiators might issue a report indicating agreement on some issues and disagreement on other issues.

CHAPTER 3

THE BENZENE NEGOTIATIONS

§3.1 Introduction

In the summer of 1983, the Occupational Safety and Health Administration ("OSHA")undertook to develop a revised standard for occupational exposure to benzene with the aid of negotiated rulemaking. An earlier OSHA revision of the benzene standard had been invalidated in litigation ultimately reaching the Supreme Court. Negotiations proceeded for a little more than a year, producing agreement in principle on a standard, which the parties did not report to OSHA because they could not agree on certain substantive details and because changes in the political climate and dissension within represented interests and those similarly situated made agreement too risky for the participants. Philip J. Harter and Gerald Cormick served as convenors and facilitators in the negotiations.

Though one of the reasons negotiations were adjourned without agreement was the expectation that OSHA would promulgate a standard unilaterally, no such standard had emerged more than a year after the negotiations ended.

§3.2 History of OSHA Regulation of Benzene

Benzene is a clear, colorless, highly flammable liquid with a strong odor. It evaporates rapidly under ordinary atmospheric conditions, giving off vapors nearly three times heavier than air. The petrochemical and petroleum refining industries produce 98% of the benzene used in the United States; the balance is produced primarily as a by-product of the coking process in steel mills. Benzene is used as a solvent or a reactant either by itself or as a component of another liquid. Approximately 274,000 workers are exposed to benzene in seven major industries: petrochemicals, petroleum refining, coke and coal manufacturing, rubber tire manufacturing; bulk storage terminals, bulk plants, and transportation of benzene and petroleum products containing benzene.[121]

The original OSHA standard for benzene exposure was adopted in 1971 from the Z-37.4-1969 consensus standard of the American National Standards Institute. This was a "national consensus standard," established pursuant to §6(a) of the Act.[122] It prescribed a time-weighted-average (TWA) exposure level of 10 ppm, ceiling concentrations of 25 ppm, and permitted excursions above the ceiling not to exceed 50 ppm for more than 10 minutes in any eight-hour work period.[123]

Revision of this standard was triggered by a 1974 criteria document prepared by the National Institute of Occupational Safety and Health ("NIOSH"), pursuant to §22(d) of the Act,[124] acknowledging the possibility that benzene might cause leukemia, but recommending retention of the national consensus standard for the time being. In 1976, the United Rubber Workers ("URW") petitioned unsuccessfully for a lowering of the standard on an emergency basis. Later that same year, NIOSH submitted a revised criteria document concluding that benzene could cause leukemia, that no safe level for benzene exposure could be established, and recommending that OSHA establish a new standard prohibiting exposure in excess of 1 ppm in air.[125]

In response, OSHA issued, on January 14, 1977, voluntary guidelines, recommending that worker exposure to benzene not exceed an eight-hour TWA of 1 ppm in any eight-hour shift of a 40-hour week. Then, on May 3, 1977, OSHA promulgated an Emergency Temporary Standard for Occupational Exposure to Benzene,[126] pursuant to §6(c) of the Act.[127] The emergency standard established an eight-hour TWA limit of 1 ppm, with a ceiling level of 5 ppm for any 15 minute period during an eight-hour work period.[128] Challenges to the standard were filed in the United States Courts of Appeals for the D.C. Circuit,[129] and the Fifth Circuit.[130]

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[121] Brief for the Secretary of Labor at 7, In Re United Steelworkers, No. 84-5842 (D.C.Cir. served Apr. 22, 1985).

[122] 29 U.S.C. §655(a) (1982).

[123] Fed.Reg. at 5919.

[124] 29 U.S.C. 669(d) (1982).

[125] Id.

[126] 42 Fed.Reg. 22516.

[127] 29 U.S.C. §655(c) (1982).

[128] Emergency Temporary Standard, 42 Fed.Reg. at 27465.

[129] Industrial Union Department v. Bingham, No. 77-1395.

On May 20, 1977, the Fifth Circuit issued a temporary restraining order against OSHA, and the emergency standard never went into effect.[131]

On May 27, 1977, OSHA published notice of a proposed final benzene standard.[132] On June 24, 1977, OSHA excluded from the proposed standard activities related to gasoline subsequent to its discharge from bulk terminals.[133] Hearings on the proposed standard were held from July 19 through August 10, 1977, at which 95 persons appeared.[134]

OSHA issued a final standard on February 10, 1978.[135] The final standard, like the emergency standard, limited exposure to an eight-hour TWA of 1 ppm, with a ceiling of 5 ppm for any 15 minute period in an eight-hour work period. It also prohibited eye and skin contact. It required measurement of employee exposure, engineering controls, work practices, personal protective clothing and equipment, signs and labels, employee training, medical surveillance, and record keeping.

Certain producers and users of benzene filed consolidated petitions in the United States Court of Appeals for the Fifth Circuit seeking pre-enforcement review of the final standard issued by OSHA.[136] The Court of Appeals invalidated the standard because it was based on findings which were unsupported by the administrative record.[137] The court concluded that OSHA had exceeded its standard-setting authority because it had not been shown that the ppm exposure limit was "reasonably necessary or appropriate to provide safe and healthful employment" as required by §3(8).[138] The court further concluded that §6(b)(5) did not

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[130] American Petroleum Institute v. OSHA, No. 77-1516.
[131] 43 Fed.Reg. at 5919.
[132] 42 Fed.Reg. 27452.
[133] 42 Fed.Reg. 32263.
[134] 43 Fed.Reg. at 5919.
[135] 43 Fed.Reg. 5918 (1978).
[136] There were two groups of petitioners: a "producers group" led by API and a "users group" led by RMA. Some RMA companies filed in the Sixth Circuit, and others filed in the Second Circuit. These cases were transferred to the Fifth Circuit in March, 1978. 581 F.2d at 499. Some of the positions taken in the multi-district litigation were reflected subsequently in negotiating positions.
[137] 581 F.2d 493, 510 (1978).

give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost.[139]

The Supreme Court affirmed the decision of the Court of Appeals on July 2, 1980.[140] The plurality concluded that OSHA's rationale for lowering the permissible exposure limit from 10 ppm of benzene to 1 ppm was based on a series of assumptions indicating that leukemia might result from exposure to 10 ppm of benzene.[141] There had been no showing that leukemia was caused by exposure to 10 ppm of benzene and that it would not be caused by exposure to 1 ppm.[142] The plurality reasoned that §3(8) of the Act implies that before the Secretary can promulgate any permanent health or safety standard, he or she must make a threshold finding that the place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices.[143] Therefore, the Secretary exceeded his power by avoiding this threshold responsibility when he relied on a special policy for carcinogens that imposed the burden on the industry of proving the existence of a safe level of exposure to benzene.[144] The plurality also noted that the Act's legislative history supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant risk of harm.[145]

Mr. Justice Stevens, joined by the Chief Justice and Mr. Justice Stewart, also concluded that the burden was on OSHA to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment.[146] OSHA did not satisfy such burden of proof.[147]

Mr. Chief Justice Burger, concurring, emphasized that

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[138] Id. at 502.
[139] Id.
[140] 448 U.S. 607, 662 (1980).
[141] Id. at 630-638.
[142] Id.
[143] Id. at 639-646.
[144] Id. at 658-659.
[145] Id. at 646-652.
[146] Id. at 653.
[147] Id.

the requirement for OSHA to "retrace its steps" with greater care does not derogate the scope of legitimate agency discretion to make policy judgments.[148] Mr. Justice Powell, concurring in part and in the judgment, noted that the Act also required the Secretary to determine that the economic effects of the new standard bore a reasonable relationship to the expected benefits and that this had not been done. Mr. Justice Rehnquist, concurring in the judgment, expressed the view that §(6)(5) of the Act, relied on by the Secretary in promulgating the benzene standard, was an unconstitutional delegation of legislative power to the executive branch.[149]

Mr. Justice Marshall, joined by Justices Brennan, White, and Blackmun, dissented. He stressed that the Act required a reviewing court to uphold the Secretary's determination if supported by "substantial evidence in the record considered as a whole."[150] Therefore, the Secretary's standard was fully in accord with the statutory mandate of §6(b)(5) of the Act that standards for toxic materials or harmful physical agents most adequately assure that no employee will suffer material impairment of health or functional capacity.[151]

Following the Supreme Court's decision, OSHA considered various quantitative risk assessments in order to determine whether it should try again to adopt a standard below 10 ppm. Of the 274,000 workers exposed to benzene, OSHA estimates that some 262,000 are exposed to concentrations at or below 1 ppm as an 8-hour time-weighted average (TWA), while approximately 10,000 are exposed to levels between 1 and 5 ppm. OSHA estimates that fewer than 1,500 workers are presently exposed to benzene levels averaging 5 ppm or more.[152]

On April 14, 1983, Dr. Sidney M. Wolfe, Director of the Public Citizen Health Research Group, wrote Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, requesting that OSHA issue an emergency temporary standard, pursuant to §6(c)(1) of the OSHA statute. Mr. Auchter denied the petition on July 1, 1983, noting that only 8-9% of workers actually are exposed to benzene in excess of 1 ppm on an 8-hour time-weighted average basis. He committed the agency, however, to issue a new permanent standard on an expedited basis, to be completed by June, 1984. Specifically, he committed to a timetable, pursuant to which OSHA would add a benzene standard to its "regulatory agenda" by June, 1983, submit a proposed standard to OMB by November, 1983, publish a proposed standard in the Federal Register by December 1983, hold a fact-finding hearing by February 1984, and publish the final standard in the Federal Register by June 1984.[153]

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[148] Id. at 663.
[149] Id. at 672-688.
[150] See 29 U.S.C. §655(f) (1982).
[151] Id. at 688-724.
[152] Brief for the Secretary of Labor at 7-8, In Re Steelworkers, No. 84-5842 (D.C.Cir. 1985, served Apr. 22, 1985).

§3.3 Decision to Negotiate

At about the same time that Auchter and Wolfe were corresponding over OSHA's plans for a revised benzene standard, Philip Harter and Gerald Cormick held discussions with OSHA staff about the potential for regulatory negotiation to facilitate OSHA standard setting activities. As a result of these discussions, Assistant Secretary Auchter decided to explore negotiated rulemaking as a means of resolving the benzene dispute. OSHA's interest in regulatory negotiation was heightened by a perception that negotiations had been useful in connection with development of a coke oven standard.[154]

Preliminary discussions with the parties and actual negotiations proceeded from July, 1983 until October, 1984. Initially the convenor/facilitators concluded that the parties were skeptical that negotiations could produce a consensus on a benzene standard within the short deadline promised for OSHA action, but that they thought meetings might be helpful. After the meetings began, the participants decided to attempt to narrow their differences and to reach agreement on a standard under a protocol that required agreement on a "total package" before anything substantive was reported to OSHA. Difficulties were experienced with representation of the petroleum industry, one of the key industry stakeholders, because of dissension among firms within the industry as to the wisdom of negotiating. Non-participant trade unions were concerned that options being considered in the negotiation might set an adverse precedent for other OSHA health standards. Nevertheless, the participants nearly agreed on a standard before finally adjourning in the fall of 1984.

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[153] See Brief for Petitioners at 7, In re United Steelworkers of America, No. 84-5842 (D.C.Cir. served Mar. 7, 1985) (quoting from Auchter letter to Wolfe).

[154] The coke oven negotiations are discussed in §6.2.

A chronology of the negotiations is presented immediately below. Analysis of the negotiations follows the chronology.

§3.4 Chronology of Benzene Negotiations

7-7-83	Letter from mediators to OSHA enclosing proposed scope of work for exploring whether it would be possible to negotiate a benzene standard.
7-8-83	OSHA announces request for data; also announces plan to employ neutral mediation to assist interested persons in reaching agreement on joint recommendations.[155]
7-21-83	OSHA signs contract with mediators.
8-10-83 to 8-19-83	Separate meetings between mediators and parties
9-83	Beginning to define participants: focusing on 2-day meeting in Oct. Inclined to proceed - fits requirements well, but do not use negotiation for development of standard: rather convene meeting to "explore potential for developing a common approach or at least for substantially narrowing issues."
9-21-83	Meeting among OSHA and potential participants. Much concern about whether OSHA can attend, consistent with Federal Advisory Committee Act. Plan exploratory meeting in October.
9-83	Mediators meet with former Secretary of Labor Dunlop.
9-26-83 to 10-5-83	Public interest groups and unions seem opposed to process; unions think they can talk to Industry without help of mediators, negotiations; opposed to negotiation or mediation; but not opposed to discussions. need to avoid use of terms "negotiation" or "mediation."

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[155] USDL 83-294. 48 Fed.Reg.31412 (Jul. 8, 1983).

10-13-83	Letter from Auchter to potential participants encouraging them to participate
10-25-83	Meeting of all participants. AFL-CIO distributes outline of proposed standard.
11-18-83	Meeting: Industry outline distributed.
12-2-83	Mediators' outline of issues distributed to participants, calling meeting for 12-13-83. Mediators suggest that serious discussions possible only if participants assume PEL at or near 1 ppm and concentrate on meeting Industry concerns thru means other than raising the PEL much above 1 ppm.
12-13-83	Meeting: One Industry participant forbidden by constituents to consider PEL of 1 ppm; attends as observer.
12-16-83	Letter on behalf of union participants to Industry participants: all four industry associations must remain participants; parties must agree to support any joint recommendations. Encourage discussions consistent with those criteria.
12-30-83	Letter from Industry participants to union participants: very positive on discussions; willing to continue discussion - can narrow issues even if no agreement. After exchange of letters, mediators assist spokespersons in resolving intra-constituency disputes over negotiating authority.
1-15-84	Unions informally say no point in meeting further unless Industry can embrace 1 ppm and agree to support whatever emerges from the negotiations.
1-19-84	Meeting: discuss outline.
1-23-84	Mediators distribute (1)another outline, (2)draft letter from participants to Auchter enclosing outline of agreed-points (3)commitment to support recommendations before OSHA and OMB. Parties observe that enforcement difficulties with a 40-hour time-weighted-average ("TWA") may militate in favor of 8-hour TWA, with rebuttable presumption that exceedence of 8-hour on one occasion is a violation. Industry attorneys drafting preamble language.
2-9-84	Meeting: discuss 1 ppm/8-hour TWA action level,

	with PEL of 1 ppm/40-hour TWA.
2-10-84	Informal indications from unions that (1) draft preamble does not reflect understanding; (2) 1/40 worth exploring (3) using employer data might work.
2-13-84	Mediators say to OSHA: nothing tangible for OSHA at this time; but effort was productive, beneficial.
2-16-84	RMA and URW report to OSHA that they agree on a dermal contact language, and enclose consensus language.
2-16-84	BNA's newsletter, "Daily Environmental Reporter" quotes Steelworkers participant as saying discussions useful, but no agreement possible.
2-17-84 to 3-2-84	Informal discussions with Management and union participants suggest willing to talk further, but doubts surfacing on union side.
3-5-84	Mediators say to OSHA: discussions adjourned despite coming very close to consensus. API internal difficulties need to be resolved. Unions opposed to putting any PEL other than 1 in document.
3-5-84	API meeting during week; mediators assist spokespersons work on intra-constituency problems with API. Auchter resignation discourages some industry proponents of further negotiation.
4-5-84	Unions need something in writing on preamble, other matters before meeting again; no point in wasting time. But willing to meet if productive; willing to consider ways of meeting Industry problems.
4-24-84	Memo from mediators to group: enclosing preamble principles.
5-2-84	Letter from OCAW to OSHA saying another meeting might produce joint recommendation.
5-24-84	Mediators' memo to group: practical deadline of 6-22 if wish to influence NPRM; OSHA won't wait; suggest another meeting.

5-31-84	Industry also doubtful about further meetings; distribution of draft standard by OSHA made agreement much more difficult; unions won't move; have nothing to talk about.
6-84	Industry and union spokespersons meet privately to review industry data on variability of measurements
6-8-84	Further work on API intra-constituency problems, including White House reassurance that the Administration supports the negotiation process.
6-8-84	Memo from mediators to participants cancelling June 13 meeting.
6-20-84	Letter from OSHA encouraging group to continue efforts; imposing deadline of July 15.
6-29-84	Unions show interest in resuming; need to get some reading on API.
7-5-84	Mediators prepare another discussion draft.
7-5-84 to 7-13-84	Unions say informally they cannot accept action level of 1/8; averaging unacceptable -- would represent major shift in OSHA policy.
7-16-84	Unions indicate willingness to talk with API privately on preamble
7-17-84	Further work on API intra-constituency problems
7-24-84	Meeting: explore parties' bottom lines: focus on action level (what number, how measured, what triggered); PEL (how measured; what triggered), remainder of standard, preamble. Agreement reached, subject to clearing up a few points with constituents.[156]
7-26-84	Parties reach tentative agreement; hope for final ratification in two weeks.

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[156] Some participants, in interviews a year later, perceived that agreement was never this close.

7-29-84	Unions informally report that non-participant unions concerned about averaging; fear setting a precedent for other health standards.
8-2-84	Mediators conclude: 2 open issues: parties agree on those but disagree on implementing language: (1) what must employer do if monitoring turns up reading over 1 ppm for 8 hr but below 2 ppm? and (2) requirements for maintenance, repair, vessel cleaning and short-term intermittent exposure; still also have problem with preamble.
8-20-84	Unions say that no one happy with averaging; will not accept averaging written into the standard. Some Industry participants uncomfortable with action-level language.
8-29-84	Mediators say to group: "we seem to have reached an impasse over concept of averaging." Suggesting two alternatives: OSHA publishes draft emphasizing areas of disagreement; or mediators submit draft to OSHA.
8-29-84	Unions oppose issuing negotiated document as NPRM even with disclaimer and highlighting disagreement - gives it too much legitimacy; concerned with degree of risk and averaging; should say to OSHA: "negotiations did not work." Reiterate groundrule that group would submit nothing less than entire package.
10-11-84	Letter from OSHA to mediators thanking them for their efforts.

§3.5 Issues in Negotiation

The central issue in the benzene negotiations was that of Permissible Exposure Level ("PEL"). The existing standard was set at 10 ppm, and OSHA's effort to set a standard at 1 ppm had been invalidated in the Supreme Court. The steel industry, facing difficulty in meeting the 10 ppm standard and questioning evidence of health hazards below that level, opposed reducing it. The rubber industry had been meeting a 1 ppm level since the late 1970's.

Between these extremes were the petroleum and chemical industries, which thought they could accept a level of 2 ppm, although they were not persuaded that it was justified on a scientific or medical basis. A 1 ppm standard was a problem for the petroleum and chemical industries because of variability in measurements. Eighty-five to ninety percent of monitoring results would show levels lower than 1 ppm, but measurements above that level also would occur, involving different locations and circumstances hard to predict or evaluate. Thus frequent measurements in a single facility would show non-compliance with a 1-ppm limit at least some of the time.[157]

Labor vigorously opposed anything higher than 1 ppm, and the number "1" had become an article of faith within the Labor Movement. New scientific data that had become available since the 1978 standard was promulgated reinforced Labor's view that a 1-ppm standard was justified based on health risk.

Industry hoped to deal with its own concerns, while satisfying Labor's desire for a standard of 1-ppm, primarily through the concept of averaging: requiring an employer to show compliance with a 1 ppm by an average of measurements taken over some time period. Many different ideas were explored with respect to averaging: a standard expressed in terms of "ppm-hours," such as a limit of 40 ppm-hours; providing that a single exceedence of the eight-hour TWA would not result in a violation as long as the average 8-hour TWA for the previous five readings was within the standard; providing that a single exceedence of the eight-hour TWA would not result in a violation as long as the average 8-hour TWA for the next five readings was within the standard.

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[157] This is known as the "exceedence problem."

Labor was concerned that a standard providing for averaging would set a precedent for other health standards. Some Labor participants preferred to set a simple PEL of 1 ppm, and to deal with the exceedence problem through enforcement guidelines.

The impact of a new benzene standard on tort liability also was a concern for Industry, particularly petroleum refiners. The tort liability issue was perceived by many of those familiar with the negotiations as more important to some Industry participants than the PEL. Gasoline has benzene in it. Benzene causes leukemia and other blood disorders, and may cause tumors. Everyone that drives a car is exposed to low levels of benzene. Employees exposed to benzene in enterprises outside the petroleum industry may sue manufacturers of benzene instead of, or in addition to, their own employers because of workers compensation limitations on suit, or for other reasons. Thus the class of potential plaintiffs against petroleum industry defendants is extremely large. Asbestos litigation, and litigation over benzene-caused disease in the Gulf-Coast shipyard industry made industry executives sensitive to the potential for benzene litigation in which their companies might be defendants.

The impact on the ability of petroleum companies to defend such lawsuits of an OSHA finding of significant health risk at levels of 10 ppm or below is speculative. Section 4(b)(4) of the OSHA Act[158] says that standards shall not be outcome determinative in tort litigation. Nevertheless, it was widely perceived that a finding could affect adversely the industry's ability to protect itself against liability in large dollar amounts. Labor was basically uninterested in tort liability but was willing to try to develop finding language satisfactory to the petroleum refiners as long as the language did not jeopardize the ability of the standard to survive judicial review.

The negotiators were faced with a dilemma, however, in formulating a compromise: Industry wanted to avoid a strong finding of health risk below 10 ppm to mitigate tort liability problems. But if the finding were weakened to reduce tort liability problems, the likelihood increased that a negotiated standard would be invalidated in the courts, leaving the parties in the position of having compromised on some issues, without the benefits of the total negotiated package.

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[158] 29 U.S.C. §653(b)(4) (1982).

The rubber industry had been concerned previously only with that part of a standard that might deal with dermal contact. The industry hoped for an exemption for uses of liquids with a content of less than 0.3% benzene by volume, but Labor was opposed to an outright exemption. The negotiators agreed upon an exemption for employers who could show both that liquids contacting employees' skin contained less than 0.3 % benzene by volume, and absorption rates such that a 1 ppm level would not be exceeded.[159]

Labor understood that variability of benzene levels presented legitimate problems for standard definition. Labor participants sought to determine actual Industry practice regarding temporary excursions and to write those practices into a standard; for example, requiring action and frequent monitoring after a spill or a ventilation system failure. They perceived, however, that the Industry participants never were willing to be pinned down as to what should be required when an exceedence occurred: in other words, what action should be taken when the "action level" was exceeded.

A separate goal for Labor was to use the benzene negotiations to induce OSHA to accept the proposition that medical surveillance was most needed for older workers, some of whom had left active service. The Industry participants were reluctant to embrace this idea, apparently for fear of stirring up tort claims by the older workers. In addition, Industry noted that screening of older workers does not permit prophylactic action to the same degree as screening of younger workers.

In general, the Labor participants were unaccustomed to the idea that different parts of a benzene standard could be traded off against each other, based on economic impact. Labor was accustomed to thinking of each piece of a standard: the PEL, engineering controls, monitoring, medical surveillance, action requirements, as independent components, each with its own rationale. Participation by Labor in discussing tradeoffs resulted only from realization that Industry viewed the standard as a total package, and was concerned with the overall economic and health impacts.

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[159] The Rubber Manufacturers Association and the URW reported their agreement to OSHA in a letter on February 16, 1984.

§3.6 Benzene as a Candidate for Negotiated Rulemaking

Benzene was selected by OSHA for negotiated rulemaking. In retrospect, for a variety of reasons, the benzene standard was both a good and a bad candidate. Benzene was a good candidate because formulation of a rule required several different subjects to be addressed, creating the potential for tradeoffs;[160] because party positions had crystallized during seven years of rulemaking proceedings and litigation reaching to the Supreme Court of the United States;[161] and because a limited number of parties were involved.[162]

The history of the litigation also made benzene a good candidate for another reason: a standard generally supported by organized labor had been invalidated in the courts because of aggressive opposition by Industry, and promulgation of a revised standard had been delayed for seven years. This demonstrated that a measure of acceptability to Industry could speed attainment of Labor's health and safety objectives.[163]

Benzene was a bad candidate because the years of administrative and court litigation had hardened party and agency positions and generated a voluminous record lending support to those positions. Benzene also was a bad candidate because of the perception that high levels of benzene exposure creates significant health risks, including the risk of fatal disease. This increased the likelihood that basic values would be at issue in negotiations.[164]

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[160] This satisfied Harter's seventh criterion, and Þ4(d) of ACUS Recommendation 82-4.

[161] This satisfied Harter's third, "issue maturity" criterion, and Þ4(a) of ACUS Recommendation 82-4.

[162] This satisfies Harter's second criterion, and Þ4(c) of ACUS Recommendation 82-4.

[163] This satisfies Harter's first, "countervailing power," criterion, and Þ4(e) of ACUS Recommendation 82-4.

[164] This violates Harter's sixth criterion, and Þ4(b) of ACUS

Finally, though benzene is a single substance, the issues confronting the different industries that would be impacted by a benzene rule were diverse, complicating the conduct of bipolar negotiations, and making it difficult for the participants to assimilate all the data relevant to the issues under discussion.[165]

Some participants thought benzene was a bad candidate because the issues were essentially technical issues, reinforcing their view that a "correct" standard could be determined objectively.[166] The technical nature of the issues, in the view of these participants, meant that the most useful process for developing a standard would be a probing examination of research data -- an activity for which negotiations are less well suited than formal adjudicatory hearings. They thought that Labor's disparity of resources and technical expertise would be a more prominent handicap in negotiations than in traditional administrative litigation. And they feared that the negotiations would delay the issuance of a standard, despite the commitment in Auchter's July 1, 1983, letter to Wolfe.[167]

Another reason benzene was a bad candidate derived from the differing perceptions of the implications of the Supreme Court's decision. Labor viewed the decision as endorsing a 1 ppm standard, and merely requiring OSHA to do a better job of marshalling scientific evidence in support of the standard. According to this perception, there was little to be accomplished in negotiations, since the only remaining problem was a technical data analysis task. The business community on the other hand, viewed the Supreme Court's decision as a repudiation of OSHA's attempts to revise the 10 ppm national consensus standard. This perception suggested that negotiations would be concerned with the full range of issues related to benzene exposure in the workplace.[168]

Recommendation 82-4.

[165] This made it difficult for Harter's seventh, "tradeoff," criterion, and Þ4(d) of ACUS Recommendation 82-4, to be realized in fact.

[166] This violates Harter's eighth criterion.

[167] Of course no standard has issued more than a year after the negotiations adjourned.

[168] This muddied Harter's fifth, "opportunity for gain," criterion.

Benzene also was a bad candidate because the statute authorizing a standard makes a finding of "significant health risk" a prerequisite for agency power to regulate. The importance of such a finding to a valid standard had been underscored by the Supreme Court in IUD v. API, and the participants in the benzene negotiation were acutely aware of it. The centrality of the significant-health-risk finding presented a dilemma that ultimately proved insuperable. If a negotiated standard was to survive judicial review,[169] a finding must be made that significant health risks resulted from the existing standard of 10 ppm. But a finding of health risks at PEL's lower than 10 was perceived, by the petroleum industry at least, as increasing potential tort liability. Industry thought that OSHA was inclined to read the requirement of the Supreme Court litigation as saying, "Quantify the risk, making it seem as high as possible at the lowest possible exposure levels." API hoped to frame a risk finding that would recognize a risk at a PEL of 10ppm, but would not say that a risk existed at the new PEL.

The participants were unable to develop language that satisfied both the tort and legal criteria.

§3.7 Incentives to Participate - In General

Both Labor and Management believed that uncertainty could be reduced by negotiations. The traditional adversary process usually results in opposing parties taking extreme positions, building a record that supports agency action anywhere in between. One participant described the result as a "crap shoot." In contrast, if the parties negotiated an NPRM, or at least narrowed the issues through negotiations, they could reduce the ambit of agency action, and thereby predict what the ultimate standard would be with greater confidence. All of the parties perceived themselves as risk averse -- Management more than Labor. Thus reduction of uncertainty was a benefit.

Virtually all participants lacked confidence in OSHA. Accordingly there was considerable concern that OSHA would "screw up" a new standard if left to the regular process, either by promulgating a standard that could not be defended in the courts or by imposing collateral requirements that imposed high costs for relatively little health benefit.

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[169] This implicates Harter's ninth, implementation, criterion.

The participants recognized that an individual employer, even a member of one of the participating trade associations, or a union entity or public interest group could challenge a negotiated standard. Yet most of the participants were reasonably confident that any such challenger would be hard pressed to convince a court to invalidate a standard that unions and trade associations most directly affected had not only agreed upon, but also actively defended. Others, however, thought that a challenge to a negotiated standard might be strengthened by the negotiation process, because of their belief that a court would find patent violations of FACA and a violation of APA prohibitions on ex-parte contact, as well as prohibitions on delegation of governmental authority to private citizens.

§3.8 Incentives for OSHA to Participate

OSHA did not "participate" in the benzene negotiations by taking part in the discussions among Industry, Labor and public interest representatives. It "participated" in other ways, however, by paying the convenor/mediators[170] and by indicating its willingness to use a negotiated standard as the basis for its rulemaking.

Enthusiasm for the process was higher at policy levels within the agency than at "working levels." Many OSHA health standards personnel and their legal staffs had major doubts about whether benzene was a good candidate for negotiated rulemaking, and further doubts about the way the negotiations were handled, believing that the convenor/facilitators consistently were too optimistic about the prospects for agreement. OSHA's commitment to the process, low from the beginning, was retarded further by its lack of participation in the negotiations themselves.

Nevertheless, sharp adversarial conflict during rulemaking and in court challenges make the agency's job more difficult, and in the words of one OSHA official, negotiated rulemaking was "worth a try."

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[170] Actually OSHA covered less than 50% of the mediators' costs. The remainder of the cost was covered by neutral non-government sources and by the mediators themselves.

§3.9 Incentives for Labor to Participate

Organized Labor had two reasons to believe that the outcome potentially obtainable through negotiations would be preferable to the outcome obtainable through the traditional rulemaking process. First, a negotiated standard accompanied by an agreement not to litigate the legality of the standard could save organized labor significant amounts of money in litigation expenses. Second, the perception that OSHA was in unfriendly hands increased Labor's fear that an agency-promulgated standard would be delayed and might, in some material respect, not satisfy Labor's desires as well as a negotiated standard.

Labor's incentive to negotiate was reinforced by from Industry's power to delay. Labor did not perceive that a 1 ppm standard was vulnerable to judicial attack; it was likely that a court would find OSHA entitled to opt for greater health protection, working from uncertain scientific evidence, as long as it supported a lower standard with a finding of significant health risks at benzene levels higher than the standard. On the other hand, Industry already had delayed promulgation of a less-than 10 ppm standard for eight years, and could delay it further by arguments presented to OMB,[171] and by litigating aggressively. The API was perceived as particularly potent in this regard because it had played the leading role in the Supreme Court litigation.

Some Labor participants perceived OMB as a bigger threat to an OSHA standard than the courts. To them, Industry acquiescence in a standard and support for the standard before OMB was more important than forbearance to sue. Labor's motivation to negotiate was strengthened by an informal OMB assurance that any OSHA proposal based on negotiated agreement would be cleared by OMB within 24 hours.

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[171] Exec.Ord. 12291, 46 Fed.Reg. 13193 (Feb. 17, 1981), reprinted as note to 5 U.S.C.A. §601 (West 1985 Supp.), requires that agencies submit "major rules" to the Office of Management and Budget ("OMB") and withhold final action until they have received and responded to OMB's views on the rule. The executive order is intended to improve the cost/benefit ratio of agency rules.

Labor's incentives to participate were mitigated by a perception that OSHA had committed itself to issuing a standard within a short time and a belief that such a standard would adopt a PEL of 1 ppm. In addition, some Labor participants were more comfortable with the traditional hybrid rulemaking process than with negotiation, believing that adversary administrative litigation, especially cross-examination of Industry witnesses, is the best way to develop scientific data and a factual record to support an adequately protective standard. They were pessimistic, however, that a standard acceptable to them could be promulgated within the 8 months promised in Auchter's July 1, 1983 letter to Wolfe, given what Labor perceived as OSHA's and OMB's unsympathetic attitude.

Other Labor participants - and some non-participants allied in interest with the Labor participants - were suspicious of the negotiation process. As noted above in the discussion of benzene as a candidate for negotiated rulemaking, some participants feared that Labor's resource limitations would be magnified in negotiations, and that negotiations might delay issuance of a standard. Nevertheless, because they thought OSHA wanted negotiations to occur, they agreed reluctantly to participate.

§3.10 Incentives for Industry to Participate

Before identifying positive incentives for Industry to participate, it is useful to note a change in Industry position since the 1977 standard was issued: During the three years between promulgation of the emergency standard and invalidation of the final 1 ppm standard by the Supreme Court, a number of firms had reduced benzene levels in their workplaces. Thus the marginal cost of of 1 ppm standard in 1983-84 was less, in real dollars, that it would have been in 1977-78.

Industry's incentives to participate depended on its perception of probable OSHA action in the absence of a negotiated standard. After the Supreme Court litigation, it appeared virtually certain that OSHA would find a way to justify a one-ppm standard, and might accompany such a standard with findings, not only that exposures at the 10 ppm level posed health hazards, but also that a one-ppm standard presented health hazards. In addition, a variety of ancillary issues would be addressed in a standard, such as health monitoring, averaging, and the action level, that might be influenced in a negotiation. There was a perception, at least among some of the Industry representatives, that some alternative needed to be found to adversarial rulemaking, and that regulatory negotiation was worth a try. Some other Industry participants were pessimistic that anything useful could come from the negotiation project, but elected to participate for defensive reasons: fearing that a process excluding them might product an undesirable outcome.

§3.11 Differences Among the Industry Participants and Within Industry Constituencies

The possibility of a 1-ppm PEL presented different concerns to the different industries involved. The petroleum chemical and rubber industries were able to tolerate a one-ppm standard better than was the steel industry. On the other hand, the petroleum and chemical industries were more concerned about tort liability than was the steel industry. This concern with tort liability made petroleum and chemical participants more willing to accept a one-ppm standard in exchange for no agency finding that benzene exposure created health below levels of 10-ppm.

The rubber industry had much narrower concerns than the other industries, limited to that part of the standard that would address dermal contact. The rubber industry expressed little concern about the PEL during the negotiations. Representatives of the different industries did not undercut each other's positions at the table, but neither did they offer aggressive support for positions other than their own.

API was primus inter pares on the Industry side. Its participation was viewed as essential by Labor, and probably none of the other industry groups was similarly viewed. API also had more internal difficulties than the other industry groups. These facts combined to make API difficult in plenary sessions and in Industry caucuses. Some of the other Industry participants resented what they perceived as API dominance, and occasionally maneuvered to have the chemical industry participants, rather than API, speak for Management in sessions of the full negotiating group.

Most of the industry participants in the benzene negotiations worked in the health and safety functions of regulated enterprises or trade associations. Industrial relations officers in the same organizations were anxious about direct dealings between Labor and Management in the benzene negotiations. One concern related to the possible content of a negotiated standard -- the possibility that it might prejudice positions in future labor-management negotiations. Another concern related the possible precedent-setting effect of industry-level negotiations; both the petroleum and chemical industries had resisted industry wide bargaining with trade unions, and opposed conduct which might make such industry-wide bargaining more likely in the future.

One of the most serious difficulties experienced during the negotiation involved internal dissension within API. Much of the difficulty was structural; many more petroleum companies, numbering in the hundreds, would be affected adversely by a regulation requiring reduced benzene exposures than companies in any of the other participating industries. Moreover, the large size of the industry leaders meant that large numbers of people within each company felt entitled to consultation on positions taken in the negotiation by Industry spokespersons.

The petroleum industry participated through a three-tiered committee system. At the highest level was a committee of 30-40 company vice presidents with responsibility for environmental and health matters. At least one member of this group was intransigent in opposing industry participation in the benzene negotiations. CEO's of petroleum companies were briefed from time to time on the negotiations, and were supportive, but they never effectively restrained their vice-presidents who had more direct control. As a result, the petroleum industry spokespersons regularly were subjected to criticism and scrutiny by constituents. Fear of adverse public reaction prevented a decision by the petroleum industry to withdraw from the negotiations, but its concerns made it difficult for meaningful compromises to be made at the bargaining table.

Despite these internal difficulties, however, the petroleum industry finally supported a compromise benzene standard with a considerable measure of unity. This compromise was the basis of the near-agreement in the negotiations.

§3.12 Intra-Labor Movement Differences

Labor participants perceived intra-constituency differences as less of a problem for Labor than for Industry. Union health and safety representatives regularly worked together on OSHA matters, and thus were accustomed to the process of compromise in formulating strategic administrative and judicial litigation strategies. Moreover, the Labor participants perceived that they had greater authority to speak for their constituents than did Industry participants.

A measure of Labor unity derived from agreement that the 1978 standard was the minimum that would be acceptable. Unity was further enhanced by respect for the lead role the AFL-CIO traditionally had taken on health and safety issues, and by personal respect for the AFL-CIO spokesperson.

Opposing these unifying forces were some differences among the participating unions and some strong feelings held by unions that did not participate. URW had greater trust in its Industry counterparts than the other unions. It was readier to accept various compromises proposed during the negotiations. OCAW historically had invested heavily in health and safety issues, but in the opinion of internal union critics, had little to show for the investment. Faced with declining membership and failed merger explorations, OCAW was perceived has having an acute need for some tangible evidence of success on the health and safety front. A negotiated benzene rule would be such evidence, on an issue of particular concern to rank-and-file refinery workers represented mostly by OCAW. There also were some differences between Labor participants accustomed to the give and take of collective bargaining and Labor participants more accustomed to the formal adversary process of traditional rulemaking.

Labor perceived that its limited resources discouraged additional conferences to iron out differences and arrive at a common position outside the full negotiations with Industry representatives. Labor differences tended to surface at the table for everyone to see.

Labor participants in the benzene negotiation experienced constituency problems not so much within their own unions, as within the Labor Movement as a whole. The Labor Movement was accustomed to approach OSHA standard setting from a global perspective rather than an industry-specific perspective. Accordingly, the precedent-setting effects of particular elements of a benzene standard were of concern to Labor participants. After agreement on a standard seemed a real possibility, the UAW and ACTU were quite critical of the process, and this criticism within the Labor Movement apparently discouraged participating union representatives from taking major risks to reach final agreement with Industry.

§3.13 Negotiation Protocols

It is important to recall that the benzene negotiations began without an expectation that a total package would be agreed upon. There was some lingering resentment that the process had begun with modest goals, and gradually had been transformed into an effort actually to negotiate a standard, largely because of the enthusiasm of Assistant Secretary Auchter, who resigned while the negotiations were underway.

The parties agreed that none would promote, as products of the negotiation process, anything that was not agreed to among all the participants. This groundrule did not, however, preclude consideration of an agreement which would leave certain issues to be decided by OSHA. In this regard the letter from the president of the Rubber Workers and the rubber industry trade association[172] was something of an irritant to Industry participants.

The parties also agreed, at least tacitly, that none of the participants would challenge any aspects of a standard that had been agreed-to in the negotiation. In this way, both Labor and Industry could buy themselves a measure of insulation from litigation if they were to agree. On the other hand, the union participants understood that the trade associations could not guarantee that none of their corporate members would litigate the legality of an ultimate standard, even if the participants reached agreement. Nevertheless, it was perceived that an agreement would be a powerful psychological motivation for a court to sustain an OSHA standard, which is entitled to considerable deference under both the APA and the OSHA Act.

§3.14 The Negotiation Process

Perhaps the most salient feature of the benzene negotiation process is that the agency with the statutory responsibility for establishing a standard did not participate in the negotiations. Rather, OSHA said that it would use any negotiated standard as a basis for its rule, encouraged the parties the work out their differences in good faith, attempted to increase incentives for affected interests to participate by threatening to proceed with its own standard regardless of the pace of negotiations, and by keeping itself informed on negotiating progress through the mediators.

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[172] The Rubber Manufacturers Association and the URW reported their agreement to OSHA in a letter on February 16, 1984.

This kind of agency non-participation had been recognized as one of the two basic forms of negotiated rulemaking.[173]. One of the advantages of agency non-participation is that deliberations among affected interests may be more candid in the absence of the ultimate decisionmaker.

In addition to these theoretical justifications for OSHA's low profile, however, there is significant evidence that OSHA limited its participation because it did not want the Federal Advisory Committee Act[174] to apply to the benzene negotiations, and perceived that if the agency did not participate, FACA would not apply.[175] OSHA subsequently was encouraged to limit its participation by the perception that substantial agreement was reached in the cotton dust rulemaking without agency involvement. Indeed the cotton dust agreement[176] was used by some OSHA personnel and their lawyers as a post-hoc model for the structure of the benzene negotiations.[177]

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[173] See Harter, 71 Geo.L.J. at 57-58.

[174] ("FACA"). FACA is addressed more fully in §8.6.

[175] The theory is that FACA applies only to the communication of advice by a group to an agency. If negotiations took place only among private citizens, and a negotiated recommendation were communicated to the agency by a single person -- the mediator -- the Advisory Committee Act would not be applicable. Substantial disagreement exists as to the merits of this interpretation of FACA.

[176] See §6.3 for a fuller discussion of the cotton dust agreement.

[177] OSHA's legal advisors developed this interpretation of FACA only in reaction to a decision at the policy level to proceed with negotiated rulemaking, combined with participant opposition to negotiating under FACA strictures. The statutory interpretation derived from the observation that purely private negotiation, as occurred with the cotton dust standard, would not be subject to FACA. See §6.3 for a description of the cotton dust negotiations. Benzene negotiations without OSHA participation would be only a small step from the cotton-dust

Many of the private participants did not want OSHA to take part in the negotiations, fearing that OSHA would adopt compromises in bits and pieces without understanding the tradeoffs involved.

Among the private participants, there was some initial discomfort with the give and take of negotiations. Industry representatives were more comfortable than Labor representatives with the idea that elements of a total package could be traded off against each other based on cost and health benefits. Over the course of discussions, the participants gradually accepted the idea that they should attempt to negotiate a "total package," largely because Industry constituents were unwilling to proceed unless they could be assured that certain aspects of a standard undesirable to them could be made up by Labor concessions on other aspects.

Everyone recognized the political problems within the petroleum industry. At one point, the API participants were forbidden to discuss a standard of 1 ppm, a restriction several participants from both Industry and Labor characterized as "silly." During the period this restriction was operative, the non-API participants continued with the negotiations, with the API representatives as observers. One objective of proceeding in such a manner was to present the API constituents with the possibility that everyone else would negotiate a standard without their participation unless unrealistic constraints on their representative were relaxed.

The health-risk-finding problem initially was handled in a discussion of general principles to be included in a preamble to a negotiated standard. The facilitators urged dealing with the preamble only in terms of general principles until the remainder of the standard was resolved. Participant attorneys urged, however, that preamble language be addressed in detail. An Industry attorney produced a draft of actual preamble language that, rather than reflecting a compromise position based on the discussion, "tilted" substantially toward Industry's position. Union lawyers who were not participating in the negotiations suggested only modest changes. When the draft preamble was presented to the Labor negotiators, however, they took it as

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procedure.

an "affront," and an act of bad faith in the negotiations.

Virtually all the participants, however, thought that the quality of most of the discussions in the negotiation was principled rather than being merely power-based, and that the interest representatives genuinely sought to understand one another and to narrow their differences as much as possible. Indeed the negotiators came much closer to agreeing than most participants thought was possible when they began discussions.

§3.15 Reasons Why No Rule Was Agreed Upon

Several conditions contributed to the "failure" of the benzene negotiations, despite attainment of agreement in principle.

Two aspects of OSHA's role were harmful: OSHA's non-participation, and OSHA's distribution of a draft standard of its own in May, 1984.

OSHA's non-participation reinforced the consensus groundrule that the contents of the negotiation would not be used as the basis for a rule unless the parties formally could agree on a "total package." If OSHA had been present during the negotiating sessions, it would have gained its own contemporaneous impressions of what the parties could accept in a final standard. In such a process, even if the parties could not agree formally on a total package, or indeed on anything, the agency nevertheless would have the benefit of negotiator deliberations in promulgating its own standard.[178]

OSHA's non participation created the necessity for the "results" of the negotiations to be communicated to OSHA, which in turn made adoption of a rigid consensus definition more likely. To the extent that results were to be communicated in a formal document, the likelihood of "failure" because of unwillingness or political inability to commit in writing to a compromise position was increased. Communications about the status of negotiations occurred via the mediators, but divergent information also was communicated directly by parties to agency personnel.

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[178] Some of the participants feared OSHA participation because they thought OSHA would use the deliberations without an understanding of the subtleties.

Because the agency could not reach its own conclusions about negotiating progress, mediator credibility with the agency and the parties was reduced. In addition, of course, OSHA's non-participation gave it less of a stake in successful negotiations and therefore less of an incentive to use its ultimate power to create incentives for parties to negotiate meaningfully.

Even without active participation in the negotiations, OSHA could have been more supportive of the negotiations. Staff level OSHA personnel gave conflicting signals to participants as to how committed the agency was to the negotiation process. As a result, some participants were never sure that OSHA really wanted the negotiations to succeed.

OSHA's distribution of a draft standard in May, 1984 hardened party positions and reduced the likelihood of their actually reaching agreement. Industry may have thought that Auchter's resignation made OMB clearance less likely and therefore negotiated agreement less urgent, but Labor thought the draft OSHA standard looked better than what the negotiators were about to agree upon.[179]

The convergence of election campaigns for the presidency of the United States and of the United Steelworkers of America impeded negotiations. The first made organized Labor reluctant to appear to be cooperating with the Reagan Administration; the second diverted attention of USW participants and probably made USW participants more reluctant to be identified with a negotiated standard that might be unpopular within the union, or with its new administration.

Departure of Assistant Secretary Auchter from OSHA before the negotiations were complete also was a problem. Auchter was enthusiastic about the negotiation process, and he also was perceived as having sufficient influence to ensure that a standard would be issued by OSHA unilaterally if the negotiations did not succeed. After he resigned, the prospect of early OMB clearance and release of a unilateral OSHA standard diminished. This changed party BATNA's,[180] lessening the incentive to agree in the negotiations.

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[179] At least one participant believes that OSHA's release of the draft standard was helpful. The draft standard made no difference in party perceptions by adopting a 1 ppm standard; all participants expected that outcome. Release of the draft may have caused some helpful movement on the industry side because it made recalcitrant constituents take seriously the threat of independent OSHA adoption of a 1 ppm standard.

Superimposed on these difficulties was the controversial nature of the averaging concept for union constituents, and a residual belief among some Industry constituents that the negotiation process was a mistake, and should be abjured in favor of aggressive litigation -- which had after all, delayed a change from the 10 ppm standard for seven years.

At least some of the Labor participants had a continuing conviction that hybrid rulemaking would have been a superior process to negotiation in developing a standard. This conviction was reinforced by some difficulty in getting specific data from Industry representatives to support the need for averaging or from OSHA as the negotiations proceeded, though some data was provided by both.

In addition, some participants thought the negotiations dragged on too long, and the meetings were too infrequent. This broke participant momentum, and added to constituency pressures as more and more constituents found out about the negotiations, or became convinced that negotiations might actually produce a standard. Increased constituent awareness put more pressure on participants to stiffen their positions. Infrequent meetings increased the likelihood that memories about positions or concessions would become fuzzy, leading to perceptions that participants were changing their positions between sessions. On the other hand, time was required to work on constituency problems, and the negotiations probably could not have moved faster.

Serious intra-constituency problems on both the Industry and Labor sides, particularly within the petroleum industry, caused participants to seem to embrace a solution to a problem at one session, only to back away from the tentative solution at the next session. This presented opposing participants with a "moving target."

There was some sentiment that the negotiators moved too abruptly from consideration of general principles in outline form to the drafting of detailed language, particularly preamble language, which dramatized the difficulty of dealing with the health-risk-finding issue. One Labor participant characterized the preamble draft as an "affront", revealing for the first time that Industry was using the negotiations "to take us for a ride."

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[180] See §2.3 for an explanation of the BATNA concept.

Two substantive issues blocked agreement, and might have been fatal to consensus on a standard even in a more favorable political environment. The first was the difficulty in reconciling Industry desire for a weaker finding of health risk against the need for an unequivocal finding to sustain a standard less than 10 ppm in litigation. The most obvious reason for the failure to reach agreement is that the parties simply ran out of ideas for ways to resolve their differences. Labor was wedded to the idea of a 1 ppm standard. The only way Industry could accept a 1 ppm standard was to deal with the exceedence problem. The only idea for reconciling these positions that occurred to anyone was some type of averaging. Averaging proved unacceptable in principle to the Labor Movement as a whole. There was just no where else to go.

Serious consideration by Labor participants of solutions to the exceedence problem was retarded to some degree by the precedent set by the coke oven negotiations.[181] The coke oven controversy was addressed by adopting a relatively simple and strict standard, and dealing with implementation problems through separate compliance directives. Some Labor participants wanted to take the same approach in the benzene negotiations -- an idea the Industry participants strongly opposed.

The second substantive reason for failure was fear by Labor representatives that the averaging concept, if adopted by the benzene negotiators, would become a precedent for averaging in other standards. This concern was made more acute when one of the Industry attorneys, who had participated in some of the Industry negotiations, made a presentation to OSHA in the presence of officials from other unions that the averaging concepts discussed in the benzene negotiations should be used in a another health standard.

Moreover, Labor feared that enforcement of certain averaging concepts would be more difficult. Enforcement of a 40-hour time-weighted-average standard would require more than one visit by a compliance officer, and Labor was concerned that inspections already were difficult to arrange. Some petroleum industry constituents also were opposed to averaging initially, but became convinced that averaging was necessary because of the variability of samples taken at a point in time.

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[181] See §6.2.

In the end, the Labor participants, after a period of consultation with non-participant unions, took a broad look at what was emerging from the negotiations, and concluded that Labor would prefer what OSHA would do unilaterally. The expectation that OSHA was committed to moving quickly, without waiting for the negotiations, combined with the perception that a unilateral OSHA standard would suit Labor better than what could be negotiated, removed any incentive that Labor had to continue further with the negotiations.

At the same time, some Industry constituents were becoming convinced that OMB would block or delay an OSHA standard unacceptable to Industry, and this complicated the search for Industry unity behind representatives in the negotiation.

In the jargon of negotiating theory, the BATNA's[182] of both Industry and Labor shifted to make a negotiated solution less attractive.

§3.16 Federal Advisory Committee Act Problems

The requirements of the Federal Advisory Committee Act are reviewed in detail in §8.6 of this report, and will not be repeated here.

OSHA regulations relating to the administration of advisory committees restrict flexibility. The Act and the regulations require preparation of agendas,[183] advance notice of meetings,[184] meetings open to the public,[185] and require verbatim transcripts and minutes.[186] The regulations provide less flexibility to accommodate regulatory negotiation than the Advisory Committee Act itself, by failing to authorize closure of a meeting to the public, and by requiring a transcript in all cases.

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[182] The BATNA concept is explained in §2.3.
[183] 29 CFR §1912.26.
[184] 29 CFR §1912.27.
[185] 29 CFR §1912.28.
[186] 29 CFR §1912.33.

Earlier sections of this chapter explained that OSHA's limited role in the benzene negotiations resulted in part from agency and participant desire not to conduct the negotiations under the Advisory Committee Act. To the extent that OSHA's limited role was responsible in part for the failure to reach a consensus on a standard, FACA was indirectly responsible.

OSHA personnel and their lawyers perceived two impediments to successful negotiation flowing from FACA. First, the requirement in the statute and in implementing regulations for a charter, for GSA approval, for advance notice of meetings, and for minutes, slows the negotiation process down, and speed was thought to be necessary.[187] Second, and more fundamentally, FACA and the implementing regulations were thought to require that meetings, not only of the full negotiating committee, but also of subgroups and caucuses, be open to the public. This was thought to be inconsistent with good faith negotiation.

Open meetings would hamper good faith negotiations, under this view, because risks to individual participants of making concessions would be increased. In fact, on one occasion in the benzene negotiations, a trade publication reported that an Industry representative had said that "we can live with" a PEL of 1 ppm. As a result of the story, that representative's constituents became alarmed and caused the representative to feel that the representative's job might be threatened. This is an example of constituency problems that some participants thought would be created by open meetings. If representatives feared adverse constituency reaction to concessions, they would make no concessions and there would be no movement from initial postures, making fruitful negotiations impracticable.

One participant viewed the open meeting problem, not in terms of constituency relations, but in terms of estoppel or prejudice to future positions if negotiations were unsuccessful. Closed meetings were necessary, under this view, to prevent participants from being embarrassed by OSHA knowing of the things they were willing to consider in order to reach agreement. OSHA participation in the negotiations, desirable for other reasons, would have exacerbated this concern. Other participants found the concern with open meetings completely unpersuasive, believing that changes in position would be communicated to OSHA by other participants, and believing that the principle of open meetings by advisory committees is valuable.

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[187] Subsequently EPA and FAA were able to satisfy these steps in 3-4 weeks, with OMB and GSA cooperation.

Some participants suggested that an adequate framework for negotiation of occupational safety and health standards exists under the advisory committee provisions of the OSHA Act. Section 7 of the Act,[188] authorizes the Secretary to establish two types of advisory committees: A National Advisory Committee on Occupational Safety and Health, and advisory committees to assist the Secretary in his or her standard setting function. OSHA, by regulation, has divided the class of standards advisory committees further into "continuing committees," and "ad-hoc committees."[189] Continuing committees assist with the development of standards in areas where there is frequent rulemaking. Ad-hoc committees assist with particular rulemaking proceedings.

The basic authority to establish occupational safety and health standards, contained in §6 of the Act[190] contemplates a role for §7 advisory committees at the option of the Secretary. If the Secretary requests recommendations from an advisory committee on a contemplated standard, the advisory committee is required to submit its recommendations to the Secretary within 90 days of its appointment. The Secretary may extend or reduce the period allowed for recommendations to be developed, but it may not exceed 270 days.[191]

When an advisory committee is appointed and the Secretary determines that a standard should be issued, he or she must publish the rule for comment within sixty days after receipt of the committee's recommendations, or the expiration of the deadline for the committee's recommendations.[192] Thereafter, the statutory standard setting process proceeds in the same manner regardless of whether an advisory committee has been involved, with an opportunity for the public to submit written comments, and hearings if they are requested in the comments.[193]

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[188] 29 U.S.C. §656 (1982).
[189] 29 CFR §1912.2 (1984).
[190] 29 U.S.C. §655 (1982).
[191] 29 U.S.C. §655(b)(1) (1982).
[192] 29 U.S.C. §655(b)(2) (1982).

Makeup of §7 advisory committees was addressed by the Seventh Circuit in National Roofing Contractors Assn v. Brennan.[194] In that case, a trade association of roofing contractors challenged their exclusion from an advisory committee established to advise the Secretary of Labor on safety standards for sloping roofs. The court found that the interests of roofing contractors were represented adequately by general contractors on the committee.[195]

Some OSHA personnel and their lawyers thought that coke oven health standards[196] had been negotiated effectively within the §7 advisory committee framework, under the active leadership of Assistant Secretary Eula Bingham. This, in their view, is evidence that successful negotiations can occur under procedures mandated by the FACA and by §7 of the OSHA Act.

Other participants thought that the §7 process is too rigid to accommodate the practical requirements of negotiated rulemaking.

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[193] 29 U.S.C. §655(b)(3)-(4) (1982).

[194] 495 F.2d 1294 (7th Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

[195] Id. at 1296.

[196] See §6.2 for a fuller discussion of coke oven negotiations.

CHAPTER 4
THE FAA FLIGHT AND DUTY TIME NEGOTIATIONS

§4.1 Introduction

The Federal Aviation Administration ("FAA") utilized negotiated rulemaking to develop revisions to FAA flight and duty time regulations after two failures to revise the regulations through traditional rulemaking.[197] Negotiations occurred beginning in the Summer of 1983, and resulted in agreement on a proposed rule which was issued by the FAA in March, 1984.[198] A final rule based on the negotiated agreement was promulgated in July, 1985. Nicholas Fidandis, then of the Federal Mediation and Conciliation Service, served as convenor and facilitator/mediator.

§4.2 History of Flight and Duty Time Regulation

Section 601(a)(5) of the Federal Aviation Act,[199] requires that the Administrator of the FAA prescribe reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service for airmen, and other employees, of air carriers. The FAA promulgated restrictions on flight and duty time in the mid 1950's,[200] which have remained essentially unchanged since that time, despite substantial changes in aircraft technology and industry structure.

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[197] This was not the first DOT experience with negotiated rulemaking. In 1982, the Federal Railroad Administration amended rules pertaining to railroad air brakes. The specific changes adopted resulted from an NPRM adopted at the joint request of the Association of American Railroads, the main industry trade association,and the Railway Labor Executives Association, a confederation of labor organizations representing rail employees. 47 Fed.Reg. 36792 (Aug. 23, 1982). Comments submitted in response to the NPRM generally were supportive, resulting in a final rule reflecting the labor-industry agreement. 47 Fed.Reg. 36792 (Aug. 23, 1982).

[198] The FAA negotiations are the subject of a study by John N. Nay and John D. Waller, of the Performance Development Institute, 600 Maryland Avenue, S.W., Suite 302, Washington 20024, under Transportation Systems Center Contract No. DTRS-57-84-C-00144.

[199] 49 U.S.C. §1421(a)(5) (1982).

[200] 14 CFR §121.470-121.525; 14 CFR §135.261 (1984).

The existing regulations applicable to major scheduled airlines (Part 121 carriers) limited annual flight time to 1,000 hours, monthly flight time to 100 hours, and limited flight time in any consecutive seven days to 30 hours. In addition, the regulation prescribed minimum rest periods.[201] Special rules applied to flag carriers,[202] and supplemental air carriers and commercial operators.[203] The existing regulations applicable to commuter and air-taxi operators (Part 135 operators) limited flying time during any twenty-four hour period to eight hours for single-pilot operations and to 10 hours for two-pilot operations. The Part 135 rule also prescribed 10 hours of rest within each 24-hour period.[204] It did not, however, contain weekly, monthly, or annual limits.

These unchanged regulations, poorly suited for the reality of commercial air transportation, generated more requests for interpretations than any other provision of the Federal Aviation Regulations. The agency had issued more than 1,000 pages of interpretations, as of early 1983.

On several occasions in the ten years preceding the regulatory negotiation, the FAA had made proposals for changing the flight and duty time regulations,[205] but "because of the complexity of the flight time rules and the economic interests affected, none of the past proposals succeeded in resolving the problems to the satisfaction of the affected parties."[206] The 1980 proposal was opposed in

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[201] 14 CFR §121.471 (1984).

[202] 14 CFR §121.480-121.493 (1984).

[203] 14 CFR §121.500-121.525.

[204] 14 CFR §135.261 (1984).

[205] See Notice No. 77-17, 42 Fed.Reg. 4390 (Aug. 29, 1977) (proposing changes in Part 135 rules); Notice No. 78-3, 43 Fed.Reg. 8070 (Feb. 27, 1978) (proposing changes in Part 121 rules); Notice No. 78-3B, 45 Fed.Reg. 53316 (Aug. 11, 1980) (revising and consolidating Part 121 and Part 135 proposals), withdrawn 46 Fed.Reg. 32413 (Jun. 22, 1981); Notice No. 82-4, 47 Fed.Reg. 10748 (Mar. 11, 1982) (revised proposal for changes in Part 121 and 135 rules), withdrawn, 47 Fed.Reg. 51585 (Nov. 16, 1982).

[206] Notice of Proposed Rulemaking, 49 Fed.Reg. 12136, 12137 (Mar. 28, 1984).

some respect by "virtually all affected segments of the air transportation community,"[207] and was withdrawn in 1981. A revised proposal was published in 1982, but was withdrawn after it was opposed by the Airline Pilots Association, Alaskan operators, rotorcraft operators and others.[208]

After these failures to revise the Flight and Duty Time regulations through the traditional rulemaking processes, the FAA turned to negotiated rulemaking in early 1983.

§4.3 Pre-Negotiation Activities

On May 12, 1983, the agency published a notice in the Federal Register[209] of its intent to hold a regulatory negotiation. The notice said that the FAA was considering the establishment of an advisory committee to develop recommendations for a rulemaking proposal on flight and duty time, using the negotiations process. It solicited comments concerning the issues that it should consider, the interests affected, the membership of the committee, the procedures that should be followed and other pertinent matters.[210] The notice reported that the FAA already had appointed Nicholas Fidandis, Director, Mediation Services, of the Federal Mediation and Conciliation Service, to act as convenor/mediator, and had made preliminary inquiry among representatives of affected interests to explore the feasibility of negotiated rulemaking. It concluded that regulatory negotiation could be successful with respect to the development of a flight and duty time proposal.

The notice expressed concern, however, that someone might use the regulatory negotiation process "simply to delay the development of an NPRM."[211] It declared that the FAA would proceed to develop an NPRM on its own if the negotiation process failed to produce a consensus, and that the committee would be dissolved by mid-August, 1983 if it was unable to reach agreement by that time.[212] The notice identified 18 specific issues to be explored in the negotiations, and listed the following interests and participants:

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[207] 48 Fed.Reg. at 21340.
[208] 48 Fed. Reg. at 21340.
[209] 48 Fed.Reg. 21339.
[210] 48 Fed.Reg. 21339 (May 12, 1983).
[211] 48 Fed.Reg. at 21343.
[212] 48 Fed.Reg. at 21343.

Interests:

- o Commercial operators, including--
  - -- non-scheduled charter operators
  - -- domestic air carriers
  - -- international air carriers
  - -- rotorcraft operators
  - -- short-haul scheduled operators
  - -- short-haul non-scheduled operators.
  - -- operators subject to special operating conditions (e.g. weather, limited operating hours and months)
- o Flight crewmembers, including pilots and flight engineers, with similar subinsterests as operators
- o Federal Government
- o Public/Consumer

Participants:

- o Federal Aviation Administration
- o National Air Carrier Association
- o National Air Transportation Association
- o Air Line Pilots Association
- o Allied Pilots Association
- o Flight Engineers International Association
- o Alaska Air Carriers Association
- o Aviation Consumer Action Project
- o Air Transport Association
- o A representative (to be identified) of scheduled air carriers whose interests are not represented by ATA

- Regional Airline Association
- Helicopter Association International

If a person or interest requested inclusion in the negotiations in response to the May 12 notice, the FAA said that it would determine (1) "whether that interest would be substantially affected by the rule, (2) if so, whether it would be adequately represented by an individual already in the negotiating group, and (3) whether in any event the requester should be added to the group or whether interests can be consolidated and still provide adequate representation."[213]

The notice declared the FAA's intention to "issue the negotiated proposal in a notice of proposed rulemaking unless it is inconsistent with the statutory authority of the agency or other statutory requirements, or it is not appropriately justified."[214] The notice said, "For the process to be successful, the interests represented should be willing to accept the final product of the advisory committee."[215]

§4.4 Establishment of Negotiating Committee

On June 28, 1983, the FAA published a final notice,[216] establishing an advisory committee to accomplish the negotiations. It rejected some requests for membership on the negotiation committee, but added the following:

- Pan American World Airways
- People Express
- New York Air
- Southwest Airlines
- DHL Cargo

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[213] 48 Fed.Reg. at 21341.
[214] 48 Fed.Reg. at 21341.
[215] 48 Fed.Reg. at 21341.
[216] 48 Fed.Reg. 29771.

- International Brotherhood of Teamsters

It noted that non-members of the committee would be given an opportunity to present information to the committee and that all interested individuals or organizations would be given full opportunity to comment on the NPRM.

§4.5 Suitability of Subject Matter

The flight and duty time rulemaking was well suited for negotiated rulemaking. The number of interests were manageable: ultimately 18 participants were involved.[217]

The issues were mature, having been subject to discussion and unsuccessful notice-and-comment rulemaking over a period of more than 20 years.[218]

Fundamental values were not perceived as being involved. Flight and duty time restrictions have obvious safety implications, but participants agreed that tradeoffs were appropriate among requirements aimed at increasing safety.[219]

The correct form of an ultimate rule was not determinable as a matter of objective scientific evidence.[220] The principal disputes related to accommodating the details of a rule to operations requirements in a variety of carrier environments.

In addition to satisfying the Harter criteria, additional factors militated in favor of successful negotiation. Chief among these was the FAA's lack of success with two NPRM's on the subject within the preceding seven years. The first was withdrawn because of opposition from Industry. The second was withdrawn because of opposition from ALPA.[221] Recent experience therefore reinforced party perceptions that the FAA might promulgate something unacceptable to its interests, a perception that Chapter 2 suggests is a prerequisite to negotiated agreement.[222]

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[217] This satisfied Harter's second criterion, and Þ4(c) of ACUS Recommendation 82-4. See §2.6 for a discussion of Harter's criteria for negotiated rulemaking and ACUS Recommendation 82-4.

[218] This satisfied Harter's third criterion, and Þ4(a) of ACUS Recommendation 82-4.

[219] This satisfied Harter's sixth criterion, and Þ4(b) of ACUS Recommendation 82-4.

[220] This satisfied Harter's eighth criterion.

§4.6 Incentives to Participate

The Labor interests had an incentive to participate because they wanted an enforceable rule for Part 121 carriers, they wanted Part 135 carriers to be covered by some rule, and negotiation was the only foreseeable way to get such a rule. Traditional rulemaking had not produced any changes in more than 20 years.

Part 135 carriers were not unhappy with the status quo, but they were convinced that some new rule covering their operations was inevitable, and they wanted to influence the content of the rule.

Part 121 carriers, represented by the Air Transport Association ("ATA"), initially were reluctant to participate, presumably because they were satisfied with the status quo. Ultimately, however, the FAA convinced them and others that it would issue a rule, and would proceed with negotiations in the absence of the ATA, possibly inducing individual Part 121 carriers to participate, or proceeding without Part 121 carrier representation in the negotiations at all.

The FAA was inclined to participate because of frustration with being unable to produce a rule through the traditional process, and a perception that a unilaterally promulgated rule would be easier to defend if the parties tried and failed to develop their own rule. Moreover, the FAA thought that it could blunt criticism of the agency's efforts if the critics were themselves unable to develop a regulation.

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[221] This implicates Harter's first criterion, and Þ4(e) of ACUS Recommendation 82-4, relating to countervailing power.

[222] This implicates Harter's fifth criterion, opportunity for gain, and is central to the BATNA concept.

§4.7 Intra-Constituency Differences

Few intraparty problems were manifest in the negotiations. One would expect that the trunk carriers would have disagreed among themselves, but ATA, once it became convinced to participate seriously in the negotiations, convened a meeting of some 16 carriers and hammered out a proposal all the carriers could accept.

The agency, however, experienced some internal problems. Program staff were inclined to prefer a rule requiring more rest than the legal staff was. Midway through the negotiations a new Administrator was appointed, who had been involved as a member of the NTSB in developing flight and duty time recommendations. After the initial negotiations[223] had been concluded, and the NPRM published, the internal FAA critics of the proposed rule were able to induce the new Administrator to make changes in the consensus rule.

§4.8 The Negotiations

The advisory committee held sixteen days of formal meetings between June 29, and September 26, 1983. More than 30 informal meetings of subgroups also occurred. The results of the negotiation are aptly summarized by the FAA's characterization in its resulting NPRM:

> The committee . . . thoroughly discussed the major issues involved in the regulation of flight time limits. Numerous proposals and justifications were drafted by participants and submitted to the committee for review . . . . Although the committee did not reach consensus on any particular proposal, its deliberations were successful because committee members gave serious consideration to and entered into candid discussion of the various proposals and justifications submitted to them. Thus the committee succeeded in narrowing the differences

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[223] Everyone expected the negotiating group to reconvene after comments on an NPRM were received.

> among parties and in reaching substantial agreement of some issues. In addition, the committee identified major areas of concern and all parties obtained significant, new information on a subject which has been discussed, without resolution, for years.[224]

After the September 26, 1983, committee meeting, the FAA took responsibility for the production of an NPRM, which the committee reviewed on February 14, 1984. In the February 14 meeting, a majority of the committee members recommended that the NPRM be published in the Federal Register as submitted. Several members of the committee dissented from this recommendation because they believed that certain issues which had not been resolved to their satisfaction should be addressed further before the NPRM was published.[225]

On March 28, 1984.[226] the FAA published the NPRM as submitted to the committee, with certain modifications in the preamble to address the following issues not resolved by the negotiators:

1. The maximum flight time allowed between rests under Parts 121 and 135 scheduled operations;
2. The minimum amount of rest required under Parts 121 and 135 scheduled operations;
3. The maximum weekly, monthly, and annual flight time limits under proposed §121.471(b);
4. The limitation of "passenger-carrying" in the definition of "scheduled operations" under proposed §135.261(b); and
5. The lack of a specific response time for deviations under proposed §135.263(f).

Pursuant to the NPRM, comments were received for 45 days, ending on May 14, 1984.[227] The FAA synthesized the comments and presented them to the committee on September 11, 1984.[228]

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[224] 49 Fed.Reg. at 12137.

[225] 49 Fed.Reg. at 12137-38.

[226] 49 Fed.Reg. 12136.

[227] This was a significantly shorter comment period that is usually afforded in traditional rulemaking.

The agency synthesized input received at this meeting, made additional changes, and submitted a draft final rule to OMB thereafter.

§4.9 Final Rule

The FAA promulgated the final flight and duty time rule on July 15, 1985.[229] The rule included certain changes from the NPRM, and was accompanied by slightly more than 350 column inches of preamble.

The FAA discussed the use of negotiated rulemaking in a background section at the beginning of the preamble, terming it "essential in achieving the highly successful result which is apparent in these amendments."[230] The remainder of the preamble, however, primarily addressed the substance of the rule, explaining the FAA's rationale and evaluating the merits of the 140 comments received during the 45-day comment period.[231] Written comments submitted by interests represented on the negotiating committee were, according to the FAA, largely restatements of their negotiating positions.[232] In some instances, the FAA justified aspects of the rule by referring to the activities of the negotiating committee, but only 50 column inches, or less than 15% of the total preamble, was devoted to discussion of the negotiation process in support of the rule.

The agency did meet objections to the short comment period, however, by pointing to the fact that the meetings of the negotiating committee were open to the public and to the fact that the negotiators heard oral presentations by non-members of the committee at its September 11, 1984 meeting.[233]

The agency made the following major changes in the

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[228] 50 Fed.Reg. at 29306.
[229] 50 Fed.Reg. 29306 (Jul.18, 1985).
[230] 50 Fed.Reg. at 29306.
[231] 50 Fed.Reg. at 39307.
[232] 50 Fed.Reg. at 29307.
[233] 50 Fed.Reg. at 29307.

NPRM:

1. Based on comments from operators, it increased the weekly flight time limitation of 32 hours imposed on Part 135 operators to 34 hours. The FAA noted that 34 hours was "within the range of weekly flight hour limitations discussed" during the negotiation process.[234]

2. It eliminated proposed §121.471(h), relaxing limitations for Part 121 operators flying propeller driven aircraft with seating capacities between 31-60. The proposed paragraph (h) was not the product of consensus in the negotiations, but was included at the request of the Regional Airlines Association, which had proposed it in negotiations. Comments on paragraph (h) were split 27-27, with regional carriers favoring the provisions and regional pilots and their organizations opposing it. The agency concluded that safety considerations militated in favor of deleting the provision, and requiring regional operations involving small aircraft larger than 30 passengers to conform to Part 121 limitations, even though this would subject some regional operators to different limitations for their Part 121 and Part 135 operations.[235]

3. The proposed 9-hour limitation on scheduled flight time between rest periods was changed to 8 hours. The nine-hour proposal was not the result of consensus among the negotiators, but was a compromise figure arrived at by the FAA.[236] Based on comments submitted by pilots objecting to the nine-hour limitation, and on the absence of information on the benefits of a nine-hour cap invited by the FAA but not submitted by carriers, the agency reverted to an eight-hour limitation in the final rule.[237]

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[234] 50 Fed.Reg. at 29309.
[235] 50 Fed.Reg. at 29310.
[236] 50 Fed.Reg. at 29310.
[237] 50 Fed.Reg. at 29311.

4. The proposed floor of 7.5 hours on the duration of rest periods was increased to 8 hours, based on comments from pilots and consumer groups opposing the shortened rest period.[238]

5. Language was added, requiring that "compensatory rest"[239] begin within 24 hours after commencement of the reduced rest period.[240] This change represented a clarification of an issue raised at the last negotiating committee meeting, and was, in the FAA's opinion, consistent with the intent reflected in the negotiated proposal.[241]

6. Part 135 operators conducting both scheduled and unscheduled operations are permitted under the final rule to conduct all operations under the rules for scheduled operations, after obtaining an appropriate operations specification amendment.[242] This represented an addition to the proposed rule, in response to comments from Part 135 operators objecting to the administrative burden of conducting their operations under different rules.

§4.10 Dynamics of Negotiation and Reasons for Success

The negotiations moved slowly until the FAA submitted a draft rule to the participants. This reinforced the view that the FAA would move unilaterally, and it reminded the parties that there would be things in a unilaterally promulgated rule that they would not like -- thus reminding them that their BATNA's were worse than what was being considered at the negotiating table.

Participation by the Vice President's office, the

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[238] 50 Fed.Reg. at 29312.

[239] "Compensatory rest" is additional rest to make up for reduced rest, below the normal minimum of nine-hours, down to the revised floor of eight hours, given at the next preceding rest period.

[240] 50 Fed.Reg. at 29312.

[241] 50 Fed.Reg. at 29312.

[242] 50 Fed.Reg. at 29315.

Office of the Secretary of Transportation, and OMB at the initial session discouraged participants from thinking that they could influence the contents of the rule outside the negotiation process. One attempt to communicate with the Administrator while the negotiations were underway was rebuffed.

The participants tacitly agreed that it would not be feasible to develop a "total package" to which the participants formally could agree. Rather their objectives were to narrow differences, to explore alternative ways of achieving objectives at less disruption to operational exigencies, and to educate the FAA on practical issues. The mediator had an acute sense that the negotiation process should stop before agreement began to erode. Accordingly, he forbore to force explicit agreement on difficult issues, took few votes, and adjourned the negotiations when things began to unravel.

In addition, the FAA, the mediator, and participants were tolerant of the political need of participants to adhere to positions formally, even though signals existed that that participants could live with something else.

Agency participation in the negotiating sessions was crucial to the usefulness of this type of process. Because the agency was there, it could form its own impressions of what a party's real position was, despite adherence to formal positions. In addition, it was easy for the agency to proceed with a "consensus" standard because it had an evolving sense of the consensus. Without agency participation, a more formal step would have been required to communicate negotiating group views to the agency. Taking this formal step could have proven difficult or impossible because it would have necessitated more formal participant agreement.

Of some assistance was the presence of an outside contractor who served as drafter. The drafter, a former FAA employee, assisted informally in resolving internal FAA disagreements over the proposed rule after negotiations were adjourned.

§4.11 FACA Issues

The negotiation group was chartered as an advisory committee, held public meetings, published minutes, and otherwise complied with the Federal Advisory Committee Act.[243] Sensitive matters were handled in caucus or through other informal means without serious objection. In the view of some participants, the public nature of the negotiations was an advantage, in that it permitted the agency to respond to later critics of the rule that they had a chance to present their views, not only by making a showing in response to the original Federal Register notice, and through the §553 notice and comment process, but also by coming to the meetings. In fact, the NTSB and a group of commuter pilots made formal presentations to the participants at one of the later meetings.

§4.12 APA Issues

The FAA did not believe that it had delegated its authority to the negotiators, despite its commitment to publish a consensus rule. Because it was a participant in the negotiations, it could forestall consensus, and thus relieve itself of the obligation to publish a rule which, in its view was inappropriate.

Ex parte contact after the negotiations had adjourned, to check out the acceptability of changes being made in response to comments and to the views of the new FAA Administrator, was considered to be well within the limitations of Home Box Office and Sierra Club v. Costle.[244] Factual information was not being sought or received; only reaction to agency exercise of policy discretion. Moreover, any alternatives presented in these conversations were supportable by the record and could pass muster under the arbitrary and capricious standard. Therefore the alternatives were not dependent on the contents of the ex parte communications.

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[243] ("FACA"). FACA is discussed more generally in §8.6.

[244] The cases are discussed in §§8.2 (hybrid rulemaking) and 8.4 (ex-parte communication).

CHAPTER 5
ENVIRONMENTAL PROTECTION AGENCY NEGOTIATIONS

§5.1 Introduction

The Environmental Protection Agency ("EPA") has shown particular enthusiasm for regulatory negotiation, and has used negotiated rulemaking successfully to develop two proposed rules, one dealing with nonconformance penalties ("NCP") for vehicle emissions, and another dealing with emergency exemptions from pesticide regulations.[245]

§5.2 The Negotiation Project

In February, 1983, EPA announced a "Regulatory Negotiation Project,"[246] The announced purpose of the project was to test (1) the utility of developing regulations by negotiation; (2) the types of regulations most appropriate for negotiated rulemaking; and (3) the procedures and circumstances which foster the most effective negotiations.[247] The agency published a notice in the Federal Register to solicit suggestions for regulations that might be candidates for negotiated rulemaking, requesting reference to summary criteria derived from ACUS Recommendation 82-4.[248]

EPA considered and rejected negotiation of a number of rules suggested as candidates.[249] Nine candidates were rejected for timing reasons:

- TSCA §8(c) Reporting Rule for Significant Adverse Effects

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[245] EPA has announced its intention to use negotiated rulemaking to develop an NPRM for Farmworker Protection Standards for Agricultural Pesticides. See 50 Fed.Reg. 38030 (Sep. 19, 1985).

[246] 48 Fed.Reg. 7494 (Feb. 22, 1983).

[247] Id.

[248] Id. at 7495.

[249] 49 Fed.Reg. 15576, 17579 (Apr. 24, 1984) (notice of intent to use negotiated rulemaking for nonconformance penalty rule development).

- CERCLA Reportable Quantities
- Standards for Control of Uranium Byproducts
- NPDES General Permit Regulations
- Water Quality Standard
- Definition of "harmful discharge of oil"
- CAA Visibility Regulations
- RCRA Definitions for Uses/Recycling of Hazardous Waste and "small quantity" Generators
- TSCA Rules for Confidential Business Information

Three candidates were rejected because they involved too many different interests or because they involved complex, unsettled questions of science:

- TSCA Rules for Inadvertent Production of PCB's
- RCRA Financial Responsibility Rules
- CERCLA Definition of "Clean" Reclaimed Hazardous Waste Sites

Four candidates were rejected because they involved "generic" issues too complicated to be broken down into negotiable components:

- National Emission Standards for Hazardous Air Pollutants
- New Source Performance Standards
- Effluent Guidelines
- TSCA §6 Rules Authorizing EPA to Take Action Against Specific Chemicals

The process leading to rejection of the rule governing disposal of low level radioactive waste ("LLW") as a candidate has been investigated in some detail.[250] EPA retained an outside convenor, ERM-McGlennon Associates, to explore whether an LLW rule was a suitable candidate. EPA and the convenor proceeded cautiously to identify potential stakeholding parties.

The preliminary review of LLW suggested that it would be a good rule for regulatory negotiation because: it was highly visible and would attract the interest of the public and top EPA officials; parties ware identifiable and of a manageable number; ground had been broken by various LLW discussion groups; and the topic of the rule was not too complex.

A snag developed when environmental groups indicated an unwillingness to participate in the negotiations due to several concerns about the rule choice and the proposed process. The demonstration also appeared to lack the active support of the top-level EPA officials. Once it became clear that the environmental groups had serious reservations, EPA dropped the LLW rule as a candidate for negotiations.

EPA did take advantage of the improved communications with environmental groups to ask them for suggestions of rules they would support for use in a regulatory negotiation demonstration.[251] David Doniger, an attorney with the Natural Resources Defense Council ("NRDC"), an environmental group, suggested Nonconformance Penalties ("NCP") as one of several candidate rules for regulatory negotiation.[252]

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[250] See Fish & Susskind, The Pre-Negotiation Phase of Regulatory Negotiation: The Case of the Low-Level Radioactive Waste Rule (Status Report II, available from authors at MIT).

[251] The characterization of the LLW pre-negotiation process is that of Fish and Susskind.

[252] McGlennon, Negotiating Regulations: Success at EPA, ALI-ABA Course of Study: Environmental Law 483, 486 (Feb. 14-16, 1985).

§5.3 NONCONFORMANCE PENALTIES

In April, 1984, EPA announced its intention to use negotiated rulemaking to develop an NPRM on Nonconformance Penalties under §206(g) of the Clean Air Act.[253] Negotiations resulted in agreement on an NPRM that was issued 11 months later.[254]

§5.4 -- Background of Nonconformance Penalties

The Clean Air Act authorizes EPA to set emissions limits for motor vehicles. Section 206(g) of the Act requires EPA to issue certificates of conformity to any class or category of heavy-duty vehicles or engines which exceeds an emission standard, but is within an upper limit associated with the standard, if the manufacturer pays a nonconformance penalty (NCP). The penalty approach was intended to mitigate the adverse effects of "technology forcing standards," by permitting technological laggards to sell their engines or vehicles by payment of a penalty, while avoiding competitive disadvantage to technological leaders.[255]

EPA proposed NCP's in two traditional rulemakings. In 1979, the agency proposed NCPs as part of its regulation for 1983 and Later Modal Year Heavy-Duty Engines,[256] and as part of its Gaseous Emission Regulations for 1983 and Later Model Year Light-Duty Trucks.[257] The proposals avoided establishing NCPs for hydrocarbon (HC) and carbon monoxide (CO) because of EPA's belief that manufacturers could meet emission standards. In 1983, as part of the Reagan Administration's regulatory relief initiatives, the agency relaxed the HC and CO emission standards, obviating, in EPA's view, the need for NCP's in the final regulations.[258] Nevertheless, EPA believed that NCPs might be necessary for oxides of nitrogen (NOx) and particulate standards scheduled to be effective in 1987, and for previously promulgated standards if future standards for other pollutants makes compliance with existing standards more difficult.[259]

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[253] 49 Fed.Reg. 15576 (Apr. 24, 1984).
[254] 50 Fed.Reg. 9204 (Mar. 6, 1985).
[255] 50 Fed.Reg. 9204 (Mar. 6, 1985).
[256] 50 Fed.Reg. at 9205, citing 44 Fed.Reg. 9464 (Feb. 13, 1979.
[257] Id. citing 44 Fed.Reg. 40784 (July 12, 1979).
[258] 50 Fed.Reg. at 9205, citing 48 Fed.Reg. 1413, 1424 (Jan.12, 1983).

In Natural Resources Defense Council v. Ruckelshaus,[260] the district court set a timetable forcing EPA to promulgate Phase I NCP rules by August 31, 1985, and Phase II rules by December 31, 1985. Phase I rules were to address when NCP's would be made available, how upper limits would be chosen, the general formula for calculating the penalties, and procedures for testing the degree of emissions nonconformity.[261] Phase II was to to apply the Phase I concepts to determine particular emissions standards for which NCPs would be available, specific upper limits, and numerical values for the variables in the penalty rate formula for particular subclasses of engines.[262]

§5.5 -- Pre-Negotiation Activities

An NRDC representative had suggested NCP's as a candidate for negotiated rulemaking when LLW was being investigated as a candidate. The convenor/facilitator, ERM-McGlennon Associates, and EPA conducted prenegotiation efforts aimed at determining whether NCP was a suitable candidate, and at identifying appropriate participants for the negotiation. The process began with EPA's program office. Once program office support was assured, the convenor contacted, by telephone, some 47 representatives of manufacturing, consumer and environmental, state agency and industry association interests.[263] These representatives generally expressed support for the negotiation project. The convenor also met personally with a smaller number of representatives, in order to asses issues, interests and positions.

These initial contacts led EPA to decide definitely to proceed with negotiated rulemaking for the NCP rule. To commence the negotiation process, EPA sponsored an organizational meeting, at which participants met each other, and discussed procedural and logistical issues such as frequency and location of negotiations, agenda formulation, and minutes. Potential participants had evidenced willingness to negotiate before the organizational meeting; the purpose of the meeting was to prevent surprises once substantive negotiations got underway.

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[259] Id.

[260] No. 84-758 (D.D.C. Sept. 14, 1984).

[261] 50 Fed.Reg. at 9205.

[262] Id.

[263] McGlennon, Negotiating Regulations: Success at EPA, ALI-ABA Court of Study: Environmental Law 489 (Feb. 14-16, 1985). Mr. McGlennon was the convenor/facilitator for the NCP negotiation.

The convenor obtained final participation commitments from participants, and organized a six-hour training session before the first actual negotiating session.[264] The goals of the training program were to:

- Educate participants on the fundamentals of environmental negotiations;
- Improve participant awareness of the dynamics of negotiations;
- Develop negotiating skills and techniques;
- Assist participants in understanding the different interests that would be represented at the negotiating table.[265]

Over 20 negotiators attended the organizational session. At the meeting, ERM-McGlennon proposed a simple set of operating protocols: (1) decision making by consensus, (2) no contact with the press during negotiations and (3) agreement on a deadline for concluding negotiations. The proposal was intended to be broad enough to allow participants to create their specific protocols and thus "own" the first agreement of the process. The negotiators were content to modify the general guidelines drafted by ERM-McGlennon.

The group discussion over resource pool protocols was far more extensive. The resource pool protocols were designed for the administration of a $50,000 fund[266] designed to defray the extraordinary expenses of participating in the negotiations and to support any necessary research and/or technical analysis required during the negotiation process. After extensive discussions, the committee reached a consensus on how to administer the pool, how to manage contracts and how to distinguish between federal and private funds in the pool.[267] The committee agreed that individual stakeholder requests would be reviewed by the entire group and managed by an independent organization. In the NCP negotiations, the pool was administered by the American Arbitration Association, under the direction of an NCP work group.

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[264] McGlennon at 492.

[265] McGlennon at 492.

[266] Half the money came from EPA. The remainder came from private sources, which EPA helped arrange. The National Institute for Dispute Resolution, assisted in designing and administering the Resource Pool.

§5.6 -- Establishment of the Negotiating Committee

In its April 1984 Federal Register notice, EPA articulated its reasons for selecting the Nonconformance Penalty rule for negotiation,[268] identified key issues for the negotiation, and proposed participants.[269] The notice solicited requests by other persons wishing to participate, requiring such requests to be accompanied by an explanation of the requester's interests, and a showing of why representation of that interest was not provided for adequately in the proposed composition of the negotiating committee. It said that such requests would be evaluated according to the following criteria:

1. Whether the requester would be substantially affected by the rule;

2. Whether the requester was already adequately represented in the negotiating group, or

3. Whether the requester should be added to the group for other reasons.[270]

The following issues were identified, to be addressed in the negotiations:

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[267] The discussion of the prenegotiation phase is taken almost verbatim from McGlennon at 492-94.

[268] The Federal Register notice discusses how NCP's meet Harter's criteria for negotiated rulemaking.

[269] 49 Fed.Reg. 15576, 17577 (Apr. 24, 1984).

[270] 50 Fed.Reg. at 17577.

1. On what basis will EPA provide NCPs? (Should the need for development of new technology to comply with a standard be a condition for an NCP application?)

2. How will upper limits be set for standards for which NCPs are available?

3. How should the penalty be determined so as to remove any competitive disadvantage to manufacturers whose engines/trucks conform to standards?

4. How should compliance levels be determined on production engines/trucks? (Should EPA use the procedures described in 44 Fed.Reg.9490, Feb. 13, 1979)?)

5. How will the penalty be periodically increased in order to create incentives for manufacturers to develop conforming engines/trucks?[271]

The notice listed the following proposed parties to the negotiation:

Manufacturers

Caterpillar

Chrysler

Cummins

Ford

General Motors

International Harvester

Isuzu

Iveco-Fiat

Mack

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[271] 50 Fed. Reg. at 17577.

Mercedes

Volvo-White

Industry Associations

Automobile Importers Association

American Truckers Association

Engine Manufacturers Association

Manufacturers Emission Controls Association

Motor Vehicle Manufacturers Association

Environmental Groups and Others

Natural Resources Defense Council

National Clean Air Coalition

State and Territorial Air Pollution Program Administrators

California Air Resources Board.[272]

Of the proposed participants, only the National Clean Air Coalition did not participate in the negotiations. The following parties were added to the committee:

Colorado Department of Health

Deutz Corporation

Onan Corporation[273]

Thus the total membership of the negotiation committee was 23.

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[272] 49 Fed.Reg. at 17578.

[273] Compare 50 Fed.Reg at 9215 (Mar.6, 1985) with 49 Fed.Reg. at 17578.

§5.7 -- Incentives to Participate

Environmental groups wanted to participate in the negotiations because they favored NCP's and they thought negotiations would result in NCP's. NCP's would make it easier for EPA to promulgate emission standards based on "leader technology"[274] In the absence of NCP's, these groups believed, EPA would be inclined to set lower standards, so a greater portion of the industry could meet them. Thus NCPs represented an escape valve that would permit tougher standards. In addition, the litigation strategy of these groups was enhanced by regulations providing for NCP's. NCP's create an alternative for laggards other than going out of business, thus mitigating impracticability arguments in Industry challenges to standards.

Laggard manufacturers had an incentive to participate to ensure that NCPs were as low as possible.

Leader manufacturers had an incentive to participate to ensure that NCPs were as high as possible to reduce the competitive advantage that otherwise might accrue to laggard manufacturers.

§5.8 -- Intra-constituency Problems

Intra party disagreements were minimal in the NCP negotiations because the relatively small number of heavy duty vehicle manufacturers made it possible to have virtually all of them as participants.

Intra-constituency disagreements also were minimal within the environmentalist community. A relatively stable coalition of environmental groups had developed over the years essentially delegating representational authority to one or two staff members who handled certain regulatory issues on behalf of the Environmental Movement as a whole. Such delegation was necessitated by resource limitations.

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[274] "Leader technology is that technology possessed by the most advanced member of the industry.

§5.9 -- The Negotiations

Negotiations began on June 14, 1984 and were concluded on October 12, 1984.[275] They were conducted under a Federal Advisory Committee charter. Committee meetings were open to the public and were noticed in the Federal Register.[276]

EPA hired a contractor to study the NCP negotiation process.[277] The contractor surveyed participants at the beginning and end of the negotiations.[278] The results of the surveys can be summarized as follows:

1. Many participants were concerned, at the outset, that the negotiating process would be more trouble than it was worth, but were generally satisfied with the result, after the negotiations were over.

2. Participants were particularly concerned about what role EPA would play as a participant, and expressed some criticism at the end of the negotiations that EPA was too passive, especially regarding technical data.

3. There was a range of enthusiasm for the process. Vehicle manufacturers had more enthusiasm than other types of participants. Support for the process seemed to correlate with a perception that it decreased adversarial postures and promoted deeper understanding of the issues and tradeoffs involved.

4. Multiple representatives of an interest, or of similar interests, was perceived as reducing power, because of the need to promote and retain consensus among the representatives. The single environmental group representative was perceived as having the most power.

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[275] 50 Fed.Reg. at 9205.
[276] 50 Fed.Reg. at 9205.
[277] Professor Lawrence Susskind of the Massachusetts Institute of Technology.
[278] See §5.9.

5. Some participants thought that litigation might be a more resource-efficient way for public interest groups to influence rulemaking than participation in negotiations. Almost everyone agreed that participation in the negotiations required substantial resources, and that environmental groups have fewer resources than other institutional interest representatives.

6. Some participants expressed the view at the outset that a benzene type consensus rule was desirable.[279] No concern about the more flexible consensus rule actually used was expressed at the end of the negotiations.

7. In general, support was expressed for OMB participation.

8. Some participants suggested that it would have been useful to have appointed a neutral technical expert, who could have assisted in evaluating data, while shielding proprietary data from disclosure to competitors or the public.

Towards the end of the negotiations, EPA made available to the negotiators a microcomputer with software that permitted evaluating the impact of different regulatory options. Most of the participants thought that this aid was helpful.

§5.10 -- Post Consensus Process

The committee reached consensus on the core conceptual issues on October 12, 1984. EPA's proposal, based on the group's consensus, appeared in the Federal Register on March 6, 1985.[280] Only thirteen comments were received. All were from participants and all supported the consensus proposal. Six specifically requested additional negotiations.

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[279] See §3.13. Such a rule prohibits written communication from the negotiation group to the agency unless a consensus emerges on all matters of concern.

[280] 50 Fed.Reg. 9204 (Mar. 6, 1985).

§5.11 -- Final Rule

The Phase I NCP rules were promulgated in final form on August 30, 1985.[281] EPA provided independent justification for the rule, referring to the negotiated rulemaking, but not relying on the consensus reached in negotiations to justify the contents.

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[281] 50 Fed.Reg. 35374 (Aug. 30, 1985).

§5.12 PESTICIDE EXEMPTIONS

EPA used negotiated rulemaking successfully a second time in revising regulations to implement exemptions to pesticide regulations. Negotiations proceeded from late 1984 to early 1985, resulting in agreement on a proposed rule, which was published in the Spring of 1985.

§5.13 -- Background

Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act")[282] gives the Administrator of EPA the discretionary authority to exempt any federal or state agency from any provision of the Act if he or she determines that emergency conditions exist which require an exemption. Regulations to implement §18 were promulgated in 1973.[283] The regulations have not been amended since their promulgation.[284]

In the Fall of 1982, the EPA Office of Pesticide Programs conducted a review of the regulations and of the programs under which EPA grants state and federal agency exemptions. The review and audit raised four concerns about the existing §18 regulations:

1. Over the five year period covered by the audit (FY 1978 to FY 1982), the number of emergency exemption actions increased about 260 percent: from 199 in FY 1978 to 724 in FY 1982. Crisis exemptions increased 753 percent: from 17 in FY 1978 to 145 in FY 1982.

2. The current regulations were codified in a manner which made them difficult to read and understand, necessitating EPA memoranda clarifying the regulations.

3. The current regulations required agencies to submit duplicative and inadequate reports.

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[282] 7 U.S.C. §136w (1982).
[283] 40 C.F.R. Part 166.
[284] 50 Fed.Reg. 13944 (Apr. 8, 1985).

4. The current regulations said little about how EPA considers risk associated with §18 uses, raising concerns about whether EPA evaluates risk associated with §18 uses.[285]

In addition, the House Subcommittee on Department Operations, Research and Foreign Agriculture expressed concern that states or Industry might be using §18 to circumvent more stringent data and risk control requirements which apply to registration actions.[286] In January 1984, EPA began to consider revisions in the regulations, and held three public hearings in January, 1984 to solicit the public's views in preparation for issuing proposed revised regulations.[287] After the hearings, EPA decided to explore negotiated rulemaking as the procedure for developing revised regulations.[288]

§5.14 -- Formation of the Negotiating Committee

In August, 1984, EPA published a Federal Register Notice declaring its intent to form an advisory committee to develop new §18 regulations.[289] The notice reported that EPA had contacted affected interests and that they were interested in participating in negotiations. The notice identified the following issues to be considered in the negotiations:

1. How long should exemptions last?
2. How should requests for repeat exemptions be handled?
3. How should EPA review crisis exemptions?

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[285] 50 Fed.Reg. at 13944.

[286] House Subcommittee on Department Operations, Research and Foreign Agriculture, Regulatory Procedures and Public Health Issues in the EPA's Office of Pesticide Programs (Dec. 17, 1982).

[287] 50 Fed.Reg. at 13944.

[288] Id.

[289] 49 Fed.Reg. 31145 (Aug. 3, 1984). The Federal Register notice explained why the pesticide exemption met Harter's criteria for negotiated rulemaking.

4. How should EPA handle requests for exemption resulting in the use of more than one chemical?

5. How should EPA define emergency?

6. Should EPA publish receipt of requests and/or approval of emergency exemptions?

7. What is the best way to ensure that use of a pesticide under an exemption meets the conditions imposed by EPA?

8. What information about alternatives should an applicant be required to provide?

9. What information should EPA require an agency using an exempt pesticide to provide?

10. What is the best way to disseminate use information to agencies?

11. What criteria should be established for reviewing exemption requests for never-registered pesticidally active ingredients?[290]

The notice identified the following tentative parties:

Environmental Groups

- o National Audibon Society
- o National Coalition Against the Misuse of Pesticides
- o National Wildlife Federation
- o Natural Resources Defenses Council

State Organizations and Control Officials

- o National Association of State Departments of Agriculture
- o Association of State and Territorial Health

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[290] 49 Fed.Reg. at 31147.

  Officials

- Association of American Pesticide Control Officials
- State FIFRA Issues Research Group

User Groups

- Pesticide Users Advisory Committee
- American Farm Bureau Federation
- California Citrus Council
- Florida Citrus Mutual

Manufacturers and Processors

- National Food Processors Association
- National Agricultural Chemical Association

Federal Agencies

- U.S.Department of Agriculture
- U.S.Environmental Protection Agency[291]

The notice invited requests for participation, to be accompanied by an explanation of the interest to be represented and a showing of why the interest would not be represented adequately by the proposed participants.

The notice reported EPA's intent to use any consensus reached in the negotiation as the basis for an NPRM, "unless it is inconsistent with our statutory requirements, or is otherwise unjustified."[292] It also limited the negotiation process to four months. If the committee had not reached consensus by January 28, 1985, the committee would have been terminated and EPA would have proceeded on its own to develop a revised regulation.[293]

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[291] 49 Fed.Reg. at 31148.
[292] 49 Fed.Reg. at 31146.

The following groups were added to the negotiating committee after the August, 1984 notice:

- American Seed Trade Association
- Defenders of Wildlife
- Interregional Research Project No.4
- National Association of Wheat Growers
- National Cattlemen's Association
- National Corn Growers Association
- National Cotton Council of America
- The Natural Resources Defense Council and the California Citrus Association did not participate.[294]

§5.15 -- Pre-negotiation Preparations

ERM-McGlennon Associates served as the convenor for the pesticide negotiations, though an in-house facilitator was used after the negotiations began. As for the NCP negotiations, a training session was held, and convenor-drafted protocols discussed. Because of the utility of the organizational meeting at the beginning of the NCP negotiations, the program office for the §18 rule specifically requested that an organizational meeting be held among the §18 negotiators. Protocols were less controversial in the pesticide negotiations than in the NCP negotiations. The Pesticide Exemption committee's resource pool was managed by the National Institute for Dispute Resolution.[295]

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[293] 49 Fed.Reg. at 31147-48.
[294] Compare id. with 50 Fed.Reg. at 13945.
[295] EPA contributed half the total amount, and the National

§5.16 -- Incentives to Participate

The issues involved in §18 exemptions involved conflict among a number of interests. Agricultural interests generally favored a more permissive exemption policy, though there were different concerns among agricultural groups depending on crop and region of the country. States generally favored a more permissive exemption policy, though sharp differences existed between health and agricultural agencies within a particular state. Environmental groups tended to favor a more restrictive exemption policy.

The inevitability of change created an incentive for all groups to participate in shaping the nature of the change. The existing program appeared to be collapsing. Between 1976 and 1982 there had been a 750% increase in self-administered "crisis exemptions." The Congressional staff study and an internal EPA audit had concluded that changes in the regulation were necessary.

§5.17 -- The Negotiations

The full committee met four times. The committee divided into three working groups which met separately from the full committee. Working group results were considered at full committee meetings. The full committee developed the consensus on the preamble and the proposed rule.

An early ground rule, insisted upon broadly within the committee, was that a consensus be reflected by commitment to a formal document. Otherwise, participants were unwilling to invest the time to participate in the negotiation. The ultimate commitment to support the consensus document before the agency emerged in the last negotiating session.

The mediator was LaJuana Wilcher from the EPA's office of General Counsel. Thus the Pesticide Exemption negotiations is the only completed experiment with negotiated rulemaking in which an internal facilitator was

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Institute for Dispute Resolution contributed the remainder.

used.

§5.18 -- Post Consensus Process

On January 16, 1975, the committee reached full consensus on the exact working of text and preamble of the NPRM. EPA published the NPRM on April 8, 1985.[296]

Nineteen comments were received. Three were from participants and supported the proposal. The other comments raised relatively minor points.

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[296] 50 Fed.Reg. 13944 (Apr. 8, 1985).

CHAPTER 6

OTHER LABOR DEPARTMENT NEGOTIATIONS - PAST AND FUTURE

§6.1 Introduction

The Department of Labor has had experience with negotiated rulemaking aside from the benzene effort discussed in Chapter 3. This chapter summarizes significant past and future Labor Department negotiations. It does not consider the advisory committee process authorized by §7 of the OSHA Act.[297] The negotiating efforts addressed in this chapter form a useful context within which to evaluate the benzene effort.

§6.2 Coke Oven Negotiations

OSHA regulations controlling employee exposure to coke oven emissions[298] were adopted in accordance with agreements reached through negotiations among OSHA, industry and organized labor.The standard sets a Permissible Exposure Level ("PEL") of 150 micrograms per cubic meter of air, averaged over any 8-hour period.[299] Employer difficulty in compliance is accommodated by permitting employers to show that engineering and work practice controls to reduce exposures to the PEL are not feasible.[300] In cases where such a showing of non-feasibility is made, the regulation requires employers to undertake other protective measures, such as requiring the use of respirators.[301]

Negotiations over the standard were begun when John T. Dunlop was Secretary of Labor and completed under the direction of Assistant Secretary Eula Bingham when Ray Marshall was Secretary of Labor.

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[297] See §3.16.
[298] 29 CFR §1910.1029 (1984).
[299] 29 CFR §1910.1029(b).
[300] 29 CFR §1910.1029(f).
[301] Id.

§6.3 The Cotton Dust Experience

Negotiated rulemaking was used to a limited extent, without agency involvement, in resolving disagreements between industry and labor over revisions in the occupational health standard for cotton dust.Cotton dust is produced when cotton is processed into yarn and fabrics, and can cause an occupational disease called byssinosis. On June 23, 1978, OSHA promulgated 29 CFR §1910.1043, setting permissible exposure limits for cotton dust in the yarn manufacturing, slashing and weaving, and knitting and nontextile industries.[302] The standard was challenged in litigation reaching the Supreme Court.[303]

In reaction to the litigation, OSHA published an Advance Notice of Proposed Rulemaking on February 9, 1972,[304] followed by an NPRM on June 10, 1983.[305] The NPRM promised hearings.

After three weeks of hybrid rulemaking hearings in the Fall of 1983, counsel for ATMI and ACTU met informally in an attempt to resolve about 15 issues in dispute between them. They reached agreement on about 12 of the issues, and discussed how they would handle the other three -- who would take positions, and who might remain silent. They communicated their agreement to OSHA by submitting post-hearing briefs with identical pages 2-76.

Their negotiations were facilitated because the record was closed, they knew the major issues from the hearing, and as a result of both these things, they had a better sense of possible outcomes. As Chapter 2 of this report explains, negotiation theory suggests that negotiated resolution of a dispute is more likely when party estimates of outcome in the absence of negotiations are similar. That theoretical proposition was realized in the cotton dust "negotiations."

Success in the cotton dust negotiations was important for three reasons. First, it encouraged OSHA to believe that negotiated rulemaking could be successful in some circumstances, and strengthened OSHA's desire to continue the benzene negotiations, which had begun some six months before the cotton dust agreement. Second, it illustrates the possibility of negotiated agreement on controversial rules[306] without agency participation, when the incentives working on the private parties are strong. Third, it illustrates the potential usefulness of negotiated rulemaking at late stages of the rulemaking process, even when negotiations have not been used to develop a proposed rule.

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[302] 43 Fed.Reg. 27350.

[303] ATMI v. Donovan, 452 U.S. 490 (1981). The rather complicated procedural history of the litigation is described in OSHA's June 10, 1983 NPRM. 48 Fed.Reg. 26962.

[304] 47 Fed.Reg. 5906.

[305] 48 Fed.Reg. 26962.

§6.4 MDA Negotiations

The Department of Labor has decided to use negotiated rulemaking to facilitate setting a standard for 4,4' - Methylenedianiline ("MDA"). On October 22, 1985, the Department published a notice in the Federal Register[307] chartering a negotiating committee and soliciting requests for additional participants in the negotiations.

MDA is an adhesive. It has been identified by the National Toxicology Program as an animal carcinogen. Other animal studies, epidemiological evidence, structure-activity relationships, and mutagenicity studies all indicate that MDA is a potential human carcinogen.[308] Several thousand workers are exposed to dermal and respiratory exposure to MDA in the chemical, rubber and adhesives industries.

OSHA announced its intention to control workplace exposure to MDA on September 20, 1983, in an Advance Notice of Proposed Rulemaking.[309] EPA also has regulatory responsibility for regulating MDA under the Toxic Substances Control Act ("TSCA").[310] EPA decided to defer regulatory action to OSHA under §9 of TSCA,[311] obligating OSHA to notify EPA by early January, 1986 as to what regulatory action OSHA intends to take.[312]

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[306] As noted, the cotton dust health standard, like the benzene standard, had been the subject of litigation reaching the Supreme Court.

[307] 50 Fed.Reg. 42789 (Oct. 22, 1985).

[308] 50 Fed.Reg. at 42791.

[309] 48 Fed.Reg. 42836.

[310] 15 U.S.C. §§2601-2629 (1982).

[311] 15 U.S.C. §2608(a).

§6.5 -- Suitability of MDA for Negotiated Rulemaking

OSHA personnel and their lawyers believe MDA is a better candidate than benzene[313] for negotiated rulemaking for the following reasons:

1. The possibility of EPA regulation creates special incentives for Industry and Labor groups to assist OSHA in developing a standard promptly. Labor has less influence at EPA than at OSHA, and Industry may fear that EPA is less sympathetic to the economic impact of health and safety standards than OSHA.

2. The absence of human carginogenicity studies makes fundamental values less an issue for MDA than for benzene because there is more room for argument as to the human health effects of MDA.

3. Fewer industries and labor organizations are concerned with MDA than with benzene.

4. The absence of large-scale health effects already manifesting themselves removes the tort liability issue which affected the benzene negotiations.

5. Because there is no existing standard for MDA and consequently no litigation history, party positions are less concrete and there is less polarization among parties.

6. The process OSHA intends to use for MDA standard negotiations is expected to work better than the process used for benzene negotiations.

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[312] 50 Fed.Reg. 27674 (Jul. 5, 1985).

[313] Benzene was selected by OSHA for negotiated rulemaking, but now OSHA perceives that benzene was, in some respects, unsuitable for negotiation.

§6.6 -- Planned Negotiating Process

OSHA intends to utilize the FAA and EPA negotiations as a model for its MDA negotiations. It has chartered an advisory committee as the forum within which negotiations will occur, and expects certain advantages to accrue from use of an advisory committee. OSHA will not be inhibited from participating in the negotiations. Funds will be available to reimburse expenses of participants as necessary to enable their participation.[314] Administrative resources will be available from the Department's advisory committee management office to support the negotiation.

OSHA intends to participate actively in the MDA negotiations, and expects that this participation will increase the usefulness of the negotiations.[315] Because OSHA contemplates that "consensus" will be defined more broadly than in the benzene negotiations, it expects to gain a sense of feasibility of different types of standards, rationales for party positions, and some narrowing of issues, even if the negotiators are unable to agree on a PEL.[316]

Preliminary discussions with potential participants already have been held. OSHA intends to use a mediator assigned by the Federal Mediation and Conciliation Service as a facilitator.[317]

The Federal Register notice, following the example of the FAA and EPA notices, identifies 13 specific issues for the negotiations to address, lists potential participants, and invites comment on the makeup of the negotiating group.[318] The notice commits OSHA to use any negotiating consensus as the basis for its NPRM for MDA[319] but declares that OSHA will terminate the negotiations and proceed on its own if no consensus is reached within six months.[320]It is, of course, too early to evaluate the effectiveness of MDA negotiations. The nature of the process envisioned, however, and the fact that OSHA decided to try negotiated rulemaking for another health standard, shows that the benzene effort, though not successful in producing an agreed-upon standard, was successful as a pilot effort in exploring a new process.

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[314] 50 Fed.Reg. at 42792 (funds for per diem and travel expenses).

[315] 50 Fed.Reg. at 42792 (OSHA representative will be a full and active participant).

[316] 50 Fed.Reg. at 42791 (referring to "rank[ing] of priorities" and "identif[ication] of acceptable solutions" as well as agreement on regulatory text and supporting rationale).

[317] 50 Fed.Reg. at 42791.

[318] 50 Fed.Reg. at 42792.

[319] 50 Fed. Reg. at 42790.

[320] 50 Fed.Reg. at 42792.

CHAPTER 7

COMPARATIVE ANALYSIS

Preceding chapters have concentrated on individual rulemaking negotiations. This chapter offers comparative analysis, serving as a platform for the conclusions and recommendations presented in Chapter 9.

Participants in negotiated rulemaking demonstrate a natural human tendency to perceive the negotiation in which they participated as more difficult than others they have heard about. The point of this comparison is not to suggest that any group had an "easy" or "hard" challenge; rather to identify differences that may inform future policy makers as to the range of choices available in structuring rule negotiations.

In the four negotiations studied, there were significant differences in subject matter, power of parties, cohesiveness of interests represented in the negotiations, procedure followed, and commitment and competence of the agencies sponsoring negotiations.

Several differences were apparent with respect to the subject matter of negotiations, and the way in which candidates for negotiation were identified. Only EPA solicited suggestions for candidates for negotiated rulemaking in a formal way. This canvass shifted the burden somewhat to major interest groups to offer subjects with respect to which they would be willing to negotiate, even as they rejected other subjects. The agency-wide initiative may have some benefits in terms of communicating clear agency support for the concept. It also, however, raised fears among some affected interests that EPA was overly committed to a process, and might force its use without sufficient consideration for its utility in a particular proceeding.

OSHA and the FAA picked subjects for negotiation that had proved intractable in traditional rulemaking and judicial review. EPA picked subjects with which the agency had not already failed in traditional processes.[321] Other differences between the history of the benzene rulemaking effort and the history of the flight and duty time effort, however, made benzene the riskiest candidate of all. No one involved in the Flight and Duty Time, NCP or pesticide controversies really believed that a rule could be determined by objective examination of scientific data. At least some of the OSHA participants believed that the matter was simply one of analyzing scientific data. The OSHA litigation had exaggerated points of disagreement, and led to divergent perceptions of what OSHA was expected to do in response to the Supreme Court's decision. The FAA's unsuccessful attempts at Flight and Duty Time rulemaking had convinced the participants that unilateral FAA action, within a fairly wide ambit of legal permissibility, could be harmful to their interests. Thus BATNA's[322] in the OSHA negotiation were relatively attractive, reducing incentives to negotiate. BATNA's in the FAA negotiation, in contract, were relatively unattractive.

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[321] Both approaches are consistent with ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982).

Somewhat surprisingly, there was little controversy over who should participate in the negotiations. In all of the initiatives except the one involving benzene, the agencies published lists of proposed participants, permitting excluded interests to make a showing as to why they should be added to the negotiating group.[323] Agencies experienced no difficulties with this approach to dealing with the representation and inclusion/exclusion issues. One could infer, however, that the benzene negotiations would have proven less difficult if some labor unions not participating could have been involved to a greater degree instead of objecting to aspects of a potential agreement from the sidelines.

Some participants in EPA negotiations, particularly environmental groups, may have found the negotiation process relatively more attractive than participants in the OSHA or FAA negotiations because some EPA participants perceived themselves as having relatively little influence with the agency through notice-and-comment or hybrid rulemaking. In contrast, Organized Labor long has enjoyed substantial informal influence with Labor Department agencies, and the airlines and pilot organizations similarly have considerable power to affect FAA policy.

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[322] The BATNA concept is explained in §2.3.

[323] This approach is recommended by Þ7 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982).

It is difficult to conceive how any of the four negotiations would have worked at all without the help of the facilitator/mediators. All three agencies used both convenors and mediators.[324] In some cases the convenor became the facilitator or mediator; in other cases, the facilitator or mediator was a different person from the convenor. The facilitator/mediators played somewhat different roles in the four negotiations. Harter and Cormick were less active in the formal benzene meetings and more active outside the formal negotiating sessions than the other neutrals. Fidandis concentrated his efforts on formal negotiating sessions and caucuses in the FAA negotiations. He was characterized as being "phenomenally effective" in caucuses. Despite the differences in styles, involvement of the facilitator/mediators almost certainly was essential to keep all of the negotiations moving, raising questions about the optional character of Paragraph 10 of ACUS Recommendation 82-4. Few participants or observers thought that either external or internal facilitator/mediators have advantages over the other. Rather, mediation experience and competence was thought more important. Mediation skills involve more than getting along well with people; they involve an instinctive awareness of group functioning and how to move toward closure.

The most striking difference between the benzene negotiations and the other negotiations is that OSHA did not participate in the benzene negotiations, while the agencies did participate in the others.[325] Agency participation militated against harmful divergence in expectations about what the agency would do unilaterally, and therefore conditioned BATNA's so as to maintain incentives for negotiated agreement. In the benzene negotiation, the participants came to believe they would do better outside the negotiations, working directly with OSHA or with OMB, and therefore their BATNA's shifted so that a negotiated agreement was unattractive.

The FAA and EPA were committed to the negotiating process as the primary means of developing a regulation; OSHA was not. At least some of the difference in agency commitment can be attributed to the lower level of participation by OSHA. The FAA and its parent agency DOT, and EPA, had key personnel who were enthusiastic about regulatory negotiation and who had the skills to mediate effectively, supplementing the mediation efforts of the facilitator/mediator; OSHA and DOL did not. In particular, both DOT and EPA have policy level officials responsible for promoting regulatory negotiation; DOL does not.

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[324] ÞÞ3 and 4 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), recommend use of convenors in every regulatory negotiation. Þ10 recommends the use of mediators in some cases.

[325] Þ4(g) and 8 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982) recommends agency participation.

Intra-constituency differences were manifest in both the benzene and flight-and-duty-time negotiations. Both ATA, representing airlines, and API, representing petroleum companies, struggled to forge a consensus that could be communicated by their negotiation spokespersons. ATA had more success than API. Notably, the FAA proposed bringing individual company representatives into the negotiations. This may have galvanized the ATA to ensure that it remained an effective participant on behalf of the entire constituency.

In three of the four experiments (benzene, flight-and-duty-time, and NCP) the participants fell short of formal agreement on some of the major issues;[326] indeed one could argue that fewer fundamental matters separated the benzene negotiators when negotiations were adjourned than separated the Flight and Duty Time negotiators. But the benzene negotiations are perceived widely as having failed, while the Flight and Duty Time negotiations are perceived as having succeeded. The explanation for different perceptions despite similarity of results is attributable to the difference in what the agency did when the negotiations were adjourned. The FAA, having participated in the negotiating sessions, had an understanding of what the parties could accept. OSHA, not having participated, had no such understanding. For the points of agreement on benzene to be communicated to OSHA required transmission of a document. Yet the benzene negotiators had agreed on a groundrule that no document would be transmitted in the absence of a formal agreement on a total package.[327] No such groundrule bound the Flight and Duty Time or the NCP participants or agency.

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[326] Þ11 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), addresses consensus, and contemplates the possibility of less than total agreement on all issues.

[327] Establishment of such a groundrule probably was essential for the negotiations to proceed. Þ11 of ACUS Recommendation 82-4,

Only EPA used the "resource pool" concept, which permits supporting travel expenses and possible expert, neutral technical assistance.[328] Participants thought the resource pool was useful, and worth utilizing in other negotiations. On the other hand, as the NCP experience showed, negotiation of a resource pool protocol can be sufficiently controversial as to get negotiations off to a bad start.

In the three cases where negotiators reached full or partial agreement, the agencies published the negotiated rule for comment,[329] clearly indicating changes from the negotiated text. In addition, both the FAA and EPA allowed the negotiators to review comments submitted in response to the Federal Register Notice.[330] Participants generally were satisfied with this approach to agreement implementation.

Compliance with the requirements of the Federal Advisory Committee Act worried everyone. But compliance with the open meeting requirement for meetings of the full negotiating group created few problems in the FAA and EPA negotiations. Agencies, including OSHA, generally followed the spirit of Paragraph 12 of ACUS Recommendation 82-4, closing sessions only as necessary to protect confidential data, or caucuses in order to protect the deliberation process. Some participants and agency personnel believed the open meetings permitted challenges to the negotiating process to be deflected more successfully than if the meetings had been closed. In the benzene negotiations, efforts to avoid FACA requirements distorted the negotiation process, primarily by foreclosing active agency participation.

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47 Fed.Reg. 30708, 30709-10 (1982), contemplates such an agreement when necessary, but it also contemplates that negotiators report on less than total agreement, identifying the issues on which they agree and those on which they disagree.

[328] The resource pool concept is a way of implementing Þ9 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), without legislation.

[329] Þ13 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), such publication.

[330] Þ14 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), recommends such review.

No court challenges to negotiated rules have materialized to date. Thus there is no experience by which to judge the need for legislation dealing with authority of agencies to use negotiated rulemaking,[331] or the need for changes in the standards of judicial review.[332]

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[331] Þ2 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709-10 (1982), recommends such legislation.

[332] Harter recommended such changes. 71 Geo.L.J. at 102.

CHAPTER 8

ANALYSIS OF SPECIFIC LEGAL ISSUES

§8.1 *Introduction*

The specific form that negotiated rulemaking took in the four efforts considered in this paper was shaped by particular concepts of administrative law. In addition, the idea of negotiated rulemaking is itself a reaction to certain administrative law developments. This chapter considers those administrative law concepts and developments.

The commentators whose reassessment of administrative law gave rise to the regulatory negotiation concept considered how judicial review would need to be altered, if at all, to accommodate negotiated rulemaking.[333] ACUS Recommendation 82-4 proposed legislation to authorize negotiation under the Administrative Procedure Act.[334] Some discussion of APA problems associated with negotiated rulemaking has occurred since then.[335]

The four completed experiments with negotiated rulemaking permit some of these ideas to be refined, because practical experience reveals what is and is not likely to be feasible in efforts to comply with current APA requirements. It is difficult, however, to say anything definitive about how appellate courts will treat negotiated rulemaking under the APA until appellate courts actually decide some cases. No such cases have arisen yet. Therefore the material in this chapter is necessarily speculative.

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[333] See Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667 (1975); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1875-76 (1981); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo.L.J. 1 (1982).

[334] See ÞÞ2, ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

[335] See Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 Colum.J.Env.L. 1 (1985).

§8.2 Hybrid Rulemaking

"Hybrid rulemaking" refers to a set of procedures imposed by Congress or the courts.[336] Under hybrid rulemaking, agencies must develop an evidentiary base for rules under procedures less formal than full trial-type hearings but more elaborate than §553 notice-and-comment procedures as they originally were envisioned.[337] Examples of statutory requirements for hybrid rulemaking are found in the Occupational Safety and Health Act,[338] and the Magnuson-Moss Act.[339] The paradigm case imposing hybrid rulemaking procedures is Mobil Oil Corp. v. FPC,[340] in which the court interpreted a statute requiring that a rule be supported by substantial evidence to obligate the agency to use at least certain elements of adversary, adjudicative procedures to develop the rule. Other courts have followed similar reasoning.[341]

In Vermont Yankee Nuclear Power Corp. v. NRDC,[342] the Supreme Court rejected the idea that courts routinely may require more than minimum procedures imposed by §553 of the APA.[343] The Vermont Yankee decision apparently has made courts more reluctant to require trial-type procedures in notice-and-comment rulemaking,[344] but they continue to require that the "record" in notice-and-comment rulemaking support the agency's decision.[345]

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[336] See generally Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U.Chi.L.Rev. 401 (1975); Pederson, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

[337] See generally ACUS Recommendation 76-3, 1 C.F.R. §305.76-3 (1983) ("Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking").

[338] See 29 U.S.C. §655(b)(3) (requiring public hearing on written objections to proposed rules).

[339] See 15 U.S.C. §57(a) (1982) (requiring opportunity for rebuttal submissions and for cross examination when FTC determines that regulations involve disputed issues of material fact).

[340] 483 F.2d 1238 (D.C.Cir. 1973).

[341] See Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C.Cir 1972) (requiring EPA to articulate basis for rule in detail); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C.Cir 1973) (requiring cross examination); Appalachian Power Co. v. Ruckelshaus, 477 F.2d 495 (4th Cir. 1973) (requiring cross examination).

[342] 435 U.S. 519 (1978).

[343] See Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv.L.Rev. 1805 (1978); Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 Harv.L.Rev. 1823 (1978).

ACUS Recommendation 76-3 identifies, for agency consideration, additions to notice-and-comment procedures that may be warranted in some rulemaking proceedings, while recommending that adversarial procedures not be superimposed on informal rulemaking as a general rule.[346]

§8.3 *Delegation Problems*

Regulatory negotiation raises potential problems with the "delegation doctrine." A central precept of democratic political theory says that governmental decisions ought to be made only by politically accountable officials. The delegation doctrine prohibits such officials from delegating their policy-making authority to persons or institutions that are not politically accountable.

In the early years of administrative law, courts and lawyers were much preoccupied with the delegation doctrine as they sought to rationalize the exercise of political power by non-elected administrative agency officials.[347].

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[344] See Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1169-71 (D.C.Cir 1980), cert. denied, ___ U.S. ___ (198) (industry failed to show "compelling circumstances" requiring cross-examination); Steel Workers v. Marshall, 647 F.2d 1189, 1203 n.6, 1227-28 (D.C.Cir. 1980) (denying right to cost-benefit analysis and cross-examination), cert. denied, 101 S.Ct. 3148 (1981).

[345] See Cotter v. Harris, 642 F.2d 792 (3d Cir. 1981); PPG Industries v. Costle, 630 F.2d 462 (6th Cir. 1980); Sholly v. NRC, 651 F.2d 792 (D.C.Cir 1981) (Tamm, MacKinnon, Robb, and Wilkey, J.J., dissenting from denial of rehearing en banc), cert. granted, 101 S.Ct. 30094 (1981). See generally Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 Geo.L.J. 699 (1979).

[346] 1 C.F.R. §305.76-3 (1983).

[347] See J.Dickinson, Administrative Justice and the Supremacy of Law in the United States (   ), Stewart, 88 Harv.L.Rev. at 1672-73, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671, 672 (1980) (Rehnquist, J. concurring in the judgment); Panama Refining Co. v.Ryan, 293 U.S. 388, 421 (1935), Schecter Poultry, 295 U.S. 495 (1935) (invalidating statute delegating authority to private industry group).

It is well accepted now, however, that delegation of quasi-legislative authority to administrative agency officials is permissible when the statute delegating the power adequately circumscribes the exercise of the power so as to permit judicial scrutiny of whether the agency has stayed inside its delegated authority.[348] Implicit in this doctrine approving delegation to administrative agencies is the idea that agency officials are themselves politically accountable to some degree. They are government officers, appointed pursuant to law,[349] When cabinet level officers make decisions, for example, political accountability is assured by the political forces operating on the President in connection with high level appointments, and by the Constitutional requirement for Senate confirmation. Accountability is less evident when lower level officials make decisions, but it presumably is ensured to some degree by appointment procedures set forth in the civil service laws and subject to various restrictions on conduct.

If, however, the agency delegates its authority to a group of private citizens, further delegation problems are presented. One such problem is whether such delegation is within the agency's authority delegated from the Congress. Another problem is that the private delegates are even less accountable politically than the agency officials.[350]

Compliance with the delegation doctrine has concerned proponents of negotiated rulemaking.[351] While it is appropriate to think about delegation issues associated with negotiated rulemaking, it is important not to exaggerate the magnitude of the problem. The early proponents of regulatory negotiation offered a number of reasons why violation of the delegation doctrine does not result from negotiated rulemaking.

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[348] Industrial Union Dep't, 448 U.S. at 686 (Rehnquist, concurring in the judgment); Yakus v. United States, 321 U.S. 414, 426 (1944).

[349] Political accountability is obvious, albeit indirect, when the agency officials are appointed by the President. See Buckley v. Valeo, 424 U.S. 1, 135 (1976) (invalidating regulatory scheme depriving President of power to appoint agency members, vesting it instead in legislative branch officers).

[350] See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating statute delegating wage-and-hour standard setting to representatives of coal producers and coal miners); Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 843-44 (5th Cir. 1978) (courts should not defer to opinions of governmental consultants as much as to agency personnel); Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind.L.J. 650 (1975); Jaffe, Lawmaking by Private Groups, 51 Harv.L.Rev. 201 (1937).

[351] See Harter, 71 Geo.L.J. at 107-109 (1982); Note, Rethinking

First, under all the current conceptions of negotiated rulemaking, and clearly reflected in the ACUS guidelines, negotiators play only an advisory role to the agency; the agency retains the final decisionmaking authority.[352] Such an advisory role has been approved by the courts in a variety of other circumstances.[353] Impermissible delegation obviously does not occur, for example, when private parties to an agency proceeding get together privately and compromise their differences.[354]

Second, the nature of negotiated rulemaking, if it is pursued under the ACUS guidelines, ensures adequacy of representation of affected groups. Thus it provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally. Thus negotiated rulemaking avoids the problem of unaccountable decisionmaking that the delegation doctrine is intended to avoid.[355]

Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv.L.Rev. at 1880-83.

[352] 94 Harv.L.Rev. at 1882-83; Harter, 71 Geo.L.J. at 109. In all of the negotiated rulemaking efforts review in this report, agencies unequivocally reserved final decisionmaking authority.

[353] See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (approving, against delegation challenge, statute permitting coal producers to propose minimum prices and other sales conditions to public commission that could approve, disapprove, or modify them); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 697-700 (3d Cir. 1979) (approving self-regulation in securities markets), cert. denied, 444 U.S. 1074 (1980); Association of Am.Physicians & Surgeons v. Weinberger, 395 F.Supp. 125, 140 (N.D.Ill. 1975) (private establishment of standards to govern health care not invalid delegation because agency provides hearing on standards); see generally 94 Harv. at 1882 n.63 (citing other cases approving delegation to private organizations).

[354] See §6.3 regarding the cotton dust negotiation.

[355] 94 Harv.L.Rev. at 1883; Harter, 71 Geo.L.J. at 109.

It bears emphasizing that the delegation doctrine overlaps other requirements imposed on agency decisionmaking under the APA and substantive statutes.[356] In a real sense, delegation problems are avoided when rules are subject to judicial review under APA standards. In other words, the delegation doctrine is embodied in APA requirements and need not be addressed separately.[357]

There are thus two entirely independent ways for negotiated rulemaking to satisfy the delegation doctrine. First, if the rule ultimately resulting from negotiated rulemaking passes judicial scrutiny under the arbitrary-and-capricious, within-statutory-authority, and in-accord-with-statutory procedures standards, it perforce has passed muster under the delegation doctrine. Second, if the affected interests have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided _ab initio._

§8.4 _Ex Parte Communications_

Negotiated rulemaking potentially contravenes a policy against "_ex-parte_" communication, derived from the Administrative Procedure Act.[358] This section explains the _ex-parte_ communication prohibition and considers the degree to which it may impede negotiated rulemaking.

Notions of fairness and due process preclude _ex-parte_ communication between parties and the decision maker in an adjudicatory process. Fundamental concepts of adjudicatory decision-making contemplate that decisions be based on the formal record, and that adversaries have the right to know and to counter information being put on the decisionmaking record.[359] _Ex-parte_ communication jeopardizes these two principles in two respects: because the opposing parties do not know the content of the _ex-parte_ conversation, they are deprived of their opportunity to respond to it; and the _ex-parte_ communication usually is not made a part of the record, and thus should not influence the decision.

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[356] These requirements are considered in §§8.2 and §8.5.

[357] See Stewart at 1674-76.

[358] See Note, _Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking_, 94 Harv.L.Rev. 1871, 1887-89 (1981) (suggesting that _ex-parte_ problem could be avoided in negotiated rulemaking by judicial review limited to question of whether party claiming harm was represented adequately in negotiations).

[359] See Friendly, _"Some Kind of Hearing"_, 123 Pa.L.Rev. 1267, 1279-94 (1975) (identifying "right to know opposing evidence," and "right to have the decision based only on the evidence

Remedies for violation of a ban on _ex-parte_ communication include setting aside the agency's decision and remanding for reconsideration of the decision after all interested parties are given an opportunity to participate in proceedings where all the information available to the agency is available for challenge.[360]

As originally conceived, informal rulemaking under the APA was not adjudicatory in character, and therefore did not envision a bar on _ex-parte_ communication. Until the early 1970's rulemaking was perceived as providing considerable flexibility. Kenneth Culp Davis, one of the deans of American administrative law, writing in 1972, had this to say about rulemaking:

> The rulemaking procedure described in [§553 of the APA] is one of the greatest inventions of modern government. It can be, when the agency so desires, a virtual duplicate of legislative committee procedure. . . .
>
> Rulemaking procedure is superior to adjudicative procedure in many ways, including the following six: . . . (4) An administrator who is formulating a set of rules is free to consult informally with anyone in a position to help, such as the business executive, the trade association representative, the labor leader. An Administrator who determines policy in an adjudication is usually inhibited from going outside the record for informal consultation with people who have interests that may be affected. In policymaking through adjudication, either the quest for understanding is likely to be impaired or the tribunal's judicial image is likely to be damaged.[361]

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presented" as basic elements of adjudicatory process).

[360] See Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C.Cir. 1977), _cert. denied_ 434 U.S. 829 (1978).

[361] K.Davis, Administrative Law Text §6.03 at 142-43 (3d ed. 1972).

He admitted however, that adjudicatory procedure might be "indispensable" when "facts about parties are in dispute."[362]

Beginning with United States v. Nova Scotia Food Products,[363] however, the idea gained currency that informal rulemaking ought to be accomplished "on the record".[364] This led in part to the "hybrid rulemaking" concept.[365] Such an on-the-record requirement naturally raised questions about the appropriateness of ex-parte communication in informal rulemaking.

In Home Box Office, Inc. v. F.C.C.,[366] the court articulated stringent limitations on ex-parte contact in conjunction with informal rulemaking:

1. Once an NPRM is issued, agency officials or employees likely to be involved in the decisionmaking process should "refuse to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such part prior to the [agency's] decision;
2. If ex-parte contacts nonetheless occur, written documents or summaries of oral communications must be placed in the rulemaking file established for public review and comment.

The court was motivated by three considerations: the possibility that the APA notice-and-comment process and the official record would be a sham, with the real decisional process based on secret communications; the need for adversarial comment on matters communicated to the agency; and the inconsistency between secrecy and "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits."[367]

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[362] Id. at 143.

[363] 568 F.2d 240 (2d Cir. 1977).

[364] See Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

[365] See §8.2.

[366] 567 F.2d 9 (D.C.Cir. 1977), cert. denied 434 U.S. 829 (1978).

[367] Another formulation of the concerns raised by ex-parte communication in notice-and-comment rulemaking was articulated in ACUS Recommendation 77-3, 1 C.F.R. §305.77-3 (1983) ((1)

The Home Box Office restrictions have been applied unenthusiastically by the courts of appeals,[368] and have been much criticized by commentators[369] and by the Administrative Conference[370] as inconsistent with the realities of agency decisionmaking and the concept of

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decisionmakers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; (2) significant information may be unavailable to reviewing courts; and (3) interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex-parte communication).

[368] Compare Iowa State Commerce Commission v. Office of Federal Inspector, 730 F.2d 1566, 1576 (D.C.Cir. 1984) (rate determinations for Alaska pipeline not invalid because ex-parte contacts occurred); Katharine Gibbs School v. FTC, 612 F.2d 658 (2d Cir. 1979) (complaints about contacts between decisionmaker and agency staff advocates should be addressed to Congress); Hercules, Inc. v. EPA, 598 F.2d 91 (D.C.Cir. 1978) (contacts between decisionmaker and agency staff advocates for assistance in reviewing record reluctantly approved because of volume of record); Action for Children's Television v. F.C.C., 564 F.2d 458 (D.C.Cir. 1977) (rejecting challenge to ex-parte discussions leading to acceptance of industry self-regulation in lieu of Commission regulation of children's programming) with United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C.Cir. 1978) (overturning approval of industry agreement because of reliance on material outside record).

[369] See Gellhorn and Robinson, Rulemaking "Due Process": An Inconclusive Dialogue, 48 U.Chi.L.Rev. 201 (1981); Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va.L.Rev. 169, 228-30 (1978) (cutting off the flow of informal information would frustrate effective decisionmaking); Nathanson, Report to the Select Committee on ex-parte Communications in Informal Rulemaking Proceedings, 30 Ad.L.Rev. 377 (1978); Preston, A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex Parte Communications and Information Derived from Agency Files After Vermont Yankee? 32 Ad.L.Rev. 621 (1980); Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 94 (1979); Note, Ex Parte Communications During Informal Rulemaking, 14 Colum.J.L. & Soc.Prob. 269 (1979).

[370] Recommendation 77-3 of the Administrative Conference of the United States, 1 C.F.R. §305.77-3 (1983) (general prohibition on ex-parte contact in informal rulemaking would be unwise).

informal rulemaking).

Major questions about the correctness of the Home Box Office limitations were raised by the D. C. Circuit in Sierra Club v. Costle.[371] Sierra Club involved ex-parte contacts between EPA and coal industry representatives, members of Congress, and White House staff after the end of the comment period on a proposed limitation on sulfur dioxide emissions. The court declined to invalidate the rule because of the contacts:

> Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among "conflicting private claims to a valuable privilege," the insulation of the decisionmaker from ex-parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex-parte contacts is of more questionable utility. . . . Later decisions of this court . . . have declined to apply Home Box Office to informal rulemaking of the general policymaking sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.

In addition to meetings of a policy-making nature in Sierra Club, documents also were submitted to EPA ex-parte. Important to the court's conclusion that these ex-parte communications were permissible was the fact that the rule was supported by information in the record, and there was no indication that the documents submitted after the comment period played any significant role in the agency's support for the rule, or that the challenger was deprived of an opportunity to respond to anything that was outcome determinative.

Other courts have permitted agency ex-parte contact during the development of NPRMs.[372] The courts also have permitted agencies to use outside assistance during the deliberative phases of rulemaking, after the record is closed. In Steelworkers v. Marshall,[373] for example, the union challenged OSHA's reliance on outside consultants to analyze the rulemaking record and to help prepare the preamble of the final rule. Both the consultants had participated in the rulemaking proceeding and had submitted material for the record. As part of their deliberative assistance, both consultants prepared additional reports, which were submitted to OSHA but not made part of the record. The union argued that these were impermissible ex-parte communications.

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[371] 657 F.2d 298 (D.C.Cir. 1981).

[372] See Home Box Office, 567 F.2d at 57 (implying that ex parte contact is limited only after NPRM is published); Iowa State Commerce Commission v. Office of Federal Inspector, 730 F.2d 1566, 1576 (D.C.Cir. 1984).

The D. C. Circuit rejected this argument:

> [T]he communications between the agency and the consultants were simply part of the deliberative process of drawing conclusions from the public record. The consultants acted after the record was closed as the functional equivalent of agency staff.

Relying on an opinion by Judge Friendly in a Freedom of Information Act suit involving the same proceeding,[374] the court concluded that, "while the reports might contain some factual matter, . . . such information was necessarily incident to and not severable from the process of summary and analysis. He suggested, moreover, that to the extent the reports drew inferences from and weighed the evidence they were more truly 'deliberative' and thus better candidates for exemption than mere summaries of the record." The reports were no less deliberative merely because they responded to criticisms of earlier on-the-record evidence by the same consultants. The response contained no new evidentiary material, but only analysis and evaluation of the record. "Thus, the earlier participation of these consultants as expert witnesses in no way disqualifies them as aides in the final decision."

It is reasonably safe to offer the following conclusions about ex-parte contact in the context of negotiated rulemaking:[375]

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[373] 647 F.2d 1189 (D.C.Cir. 1980), cert. denied 453 U.S. 913 (1981).

[374] Lead Industries Assoc v. OSHA, 610 F.2d 70 (2d Cir. 1979) (finding consultant reports to be within Exemption 5 of the FOIA).

[375] For a slightly different proposal, see Note, Rethinking

1. The rule ultimately adopted by the agency must be supported by factual information contained in the official record. There is no reason that the negotiators cannot discuss and even agree upon factual information to be put in the record.

2. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an appropriate adversarial context. This opportunity may be provided by an opportunity to participate in the negotiations or by an opportunity to comment as part of the notice-and-comment process.

3. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself.[376]

4. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy, rather than new factual, matters.

5. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex-parte* contact will be found permissible by a court.[377]

Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv.L.Rev. 1871, 1888-89 (1981).

[376] See Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1887-89 (1981) (suggesting that *ex-parte* problem could be avoided in negotiated rulemaking by judicial review limited to question of whether party claiming harm was represented adequately in negotiations).

§8.5 Judicial Review Under Arbitrary and Capricious Standard

Section 706 of the Administrative Procedure Act[378] provides that a court may overturn an agency rule if it finds the agency's action in promulgating the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[379] It is common for substantive statutes authorizing agencies to make rules to include similar standards for judicial review, or to incorporate the APA standard by reference.[380] Moreover, some commentators have suggested that Congress may not delegate authority to act arbitrarily and capriciously, and therefore, that an arbitrary and capricious standard of judicial review would be the minimum constitutionally allowed.[381]

The Supreme Court recently has reiterated what

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[377] See Carlin Communications v. F.C.C., 749 F.2d 113, 118 n.9 (2d Cir. 1984) (no violation of agency rules or general principles of administrative law where ex-parte contacts summarized in record of notice and comment rulemaking).

[378] 5 U.S.C. §706 (1982).

[379] 5 U.S.C. §706(2)(A) (1982).

[380] See, e.g. Occupational Safety and Health Act, 29 U.S.C. §655 (1982) (impliedly subjecting rules to APA review by exempting emergency standards from APA, while imposing additional requirement that agency determinations in rulemaking must be supported by "substantial evidence in the record taken as a whole"); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1392(b).

[381] See Berger, Administrative Arbitrariness and Judicial Review, 65 Colum.L.Rev. 55 (1965) (APA §701(a)(1) excepts from judicial review only lawful exercise of discretion; abuses of discretion may be corrected judicially); Jaffe, Judicial Control of Administrative Action 359, 375 (1965) (presence of discretion should not bar court from considering claim of illegal or arbitrary use of discretion). Cf. Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 330-75 (3d ed. 1973) (considering constitutionality of statutory preclusion of judicial review).

"arbitrary and capricious" means:

> Normally an agency rule would be arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[382]

While considerable latitude is given to agency discretion, the Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."[383] Agency explanation takes on added importance because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself.[384] The obligation to explain is not trivial. OSHA's explanation of the original benzene standard, for example, filled 184 pages of an appendix to the standard in the Federal Register,[385] but the Supreme Court nevertheless invalidated the standard.[386]

Uncertainty about facts may permit the agency to take one course of action or another based on its policy judgment, but the agency must explain its movement "from the facts and probabilities on the record to a policy conclusion."[387] It is not sufficient for an agency merely to recite the terms "substantial uncertainty" as a justification for its actions.[388]

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[382] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983). The Motor Vehicle Manufacturers case ploughed new ground with respect to applying the arbitrary and capricious standard to a decision to rescind a rule, but it did nothing new or controversial with respect to the meaning of the standard itself.

[383] 463 U.S. at 48.

[384] 463 U.S. at 50; Industrial Union Dept. v. American Petrol.Inst., 448 U.S. 607, 631 n.31 (1980).

[385] Industrial Union Dept. v. American Petrol.Inst., 448 U.S. 607, 631 (1980).

[386] See §3.2 of this report.

[387] 463 U.S. at 52.

[388] 463 U.S. at 52.

This means that a rule promulgated merely because it was agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,[389] unless the agency offers its own rationale and support for the content of the rule.[390] Of course part of the rationale can be the fact that affected interests reached agreement in negotiations. Because rationality also requires a nexus between the rule and factual support for it,[391] the agency rationale also needs to demonstrate factual support in a "record" developed in the rulemaking proceeding. While a detailed record of the negotiations could chill interchange among negotiators, there is no reason negotiators should not discuss what needs to be put in the record to support their consensus proposal, and what the agency should say in its rationale.

The same things negotiators and sponsoring agencies should do to avoid delegation and *ex-parte* communication problems also will reduce the likelihood that a court would find a negotiated rule to be arbitrary and capricious.

All of the administrative law doctrines militate against negotiation of a final rule without some opportunity for public comment.[392] Using negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking, as occurred in all three of the successful negotiated rulemaking experiments, is a sound approach, with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of complaints by non-participants in the negotiations that they were denied a fair opportunity to influence the content of the rule.[393]

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[389] See Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667, 1799-1800 (1975) (no logical reason to preserve current concepts of judicial review if rulemaking is a political process with adequate representation of affected interests, but courts unlikely to change approaches); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1885-87 (1981) (suggesting that use of negotiation ought to relax judicial review standards); Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 Colum.J.Env.L. 1 (1985) (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much).

[390] The FAA justification for the negotiated Flight and Duty Time rule and EPA's justification for the NCP rule are good examples. See §§4.9 and 5.11.

[391] Requirements for support in the record for a rule, contained in substantive statutes, reinforces the need to give attention to the record support for a negotiated rule.

[392] Þ13 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30710 (1982), provides for publication of a negotiated rule for comment.

§8.6 Federal Advisory Committee Act Problems

The Federal Advisory Committee Act[394] ("FACA") presents a serious threat to the effectiveness of negotiated rulemaking. A strict interpretation of the Act requires that regulatory negotiation sessions be open to the public. Such an interpretation, if applied by agencies or insisted upon by the courts, could make candid exploration of compromise by interested parties difficult.

FACA was enacted in 1972,[395] after 15 years of intermittent Congressional concern over the utilization of advisory committees by administrative agencies.[396] The Act regulates the creation, composition and functioning of advisory committees. It requires that committee meetings be open to the public. Exceptions to the open meetings requirement originally were available only when the subjects to be discussed qualified for an exemption under the Freedom of Information Act.[397] In 1976, however, the Act was amended to apply the Sunshine Act's[398] open meeting exceptions to advisory committees.[399] As amended, the Act

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[393] See the FAA response to such complaints, discussed in §4.11.

[394] 5 U.S.C. App. II (1982).

[395] 86 Stat. 770.

[396] See Perritt & Wilkinson Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years, 63 Geo.L.J. 725, 731-35 (1975).

[397] 5 U.S.C. App. I (1982). See Perritt & Wilkinson, 63 Geo.L.J. at 735 (describing original exceptions to open meetings requirement).

[398] 5 U.S.C. §552b (1982).

[399] §10(d) of the amended FACA reads as follows:

> Subsections (a)(1) and (a)(3) [requiring meetings to be open and affording interested persons the right to attend meetings and to file statements] of this section shall not apply to any portion of an advisory committee meeting where the . . . agency to which the advisory committee reports, determines

permits advisory committee meetings to be closed to the public only when the meeting will involve (1) matters covered by exemptions 1-7 of the Freedom of Information Act, (2) criminal accusations directed at a person or other formal censures of a person, (3) frustration of proposed agency action if prematurely known, or (4) agency participation in formal rulemaking or litigation.[400]

Remedies for violation of the Act are limited, and probably do not include invalidation of agency decisions made in reliance on advisory committee proceedings that violate the Act.[401]

GSA regulations implementing the FACA[402] permit certain meetings to occur without compliance with the Act,[403] including meetings for the purpose of exchanging facts or information;[404] meetings initiated by a private group (rather than by the agency) for the "purpose of expressing the group's view," providing the agency does not use the group as a "preferred source of advice or recommendations;[405] and meetings for the purpose of "obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations."[406]

In addition, the preamble to the GSA regulations[407] suggests that subcommittees of advisory committees are

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that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination.

[400] See generally Note, Government in the Sunshine Act: Opening Federal Agency Meetings, 26 Am.U.L.Rev. 154, 172-195 (1976) (discussing ten Sunshine Act exemptions).

[401] See Braniff Master Executive Council v. CAB, 693 F.2d 220 (D.C.Cir. 1982); Pan American World Airways v. CAB, 684 F.2d 31 (D.C.Cir. 1982) (remedies for violation of FACA limited to disclosure of minutes).

[402] 1 C.F.R. §§101.6.1001-6.1035 (1984).

[403] 1 C.F.R. §101-6.1004 (1984). See 48 Fed.Reg. 19325 (Apr. 29, 1983) (preamble to GSA regulations).

[404] Id., Þh(1).

[405] Id., Þh(2).

[406] Id., Þj.

[407] 48 Fed.Reg. 19325 (Apr.29, 1983).

covered by the Act only when they are structured so as to report directly to the agency rather than through the main advisory committee, and that informal meetings of two or more members of advisory committees are not covered when the purposes of the meetings are:

(1) to gather information;

(2) to conduct research; or

(3) to draft option papers

for the full advisory committee.

Two impediments to successful regulatory negotiation flow from FACA. First, the requirement in the statute and in implementing regulations for a charter, for GSA approval, for advance notice of meetings, and for minutes slow the negotiation process down. Second, and more fundamentally, some lawyers think that FACA and the implementing regulations require that meetings, not only of the full negotiating committee, but also of subgroups and caucuses, be open to the public. Such a requirement is likely to prevent effective negotiation.

Open meetings increase risks to individual participants of making concessions. On one occasion in the benzene negotiations, trade publication reports led to strong constituency reaction, impairing the authority of an Industry representative. If representatives fear constituency reaction to tentative concessions, they will make concessions grudgingly. Such reluctance to move from initial postures, makes fruitful negotiations difficult.[408]

Some interests prefer keeping the threat of open negotiating sessions alive, however. As explained in §2.3, closing meetings may have an adverse effect on the power of public interest representatives.

The concerns about the influence of FACA on the regulatory negotiation process warrant an attempt to characterize the magnitude of the constraints imposed by FACA. Three questions frame the characterization: (1) is a regulatory negotiation group an "advisory committee" within the meaning of the Act? (2) if it is, does the Act compel that meetings of the group and of any subordinate bodies be open to the public? (3) if the meetings must be open to the public, does this represent a real threat to the efficacy of negotiation? The three questions are hierarchical, in the sense that question (2) need not be addressed if one can give a confident negative answer to question one. Similarly, question (3) need not be addressed, if the answer to question (2) is "no."

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[408] These concerns led ACUS to recommend Congressional action to relax FACA requirements for negotiated rulemaking. See Þ2 ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982).

The answer to the first question is that regulatory negotiation groups probably are advisory committees under a literal interpretation of the Act. It is difficult to argue that a regulatory negotiation group is not "established by [an] agency" "in the interest of obtaining advice or recommendations."[409] The agency, not having delegated its final authority to the negotiators,[410] must be seeking advice. Since, in negotiated rulemaking, the agency is seeking consensus advice, it is seeking advice from a group. This reasoning leads to the conclusion that FACA is applicable. But FACA is concerned with communication of advice to the agency, not how the advice is developed as among private interests. Under this view, FACA applies only to sessions at which the agency is present, not to negotiation sessions or caucuses from which the agency is absent.[411] Some caselaw exists supporting a position that an agency might be able to structure a negotiated rulemaking in a manner that would permit a court to find that no advisory committee was involved,[412] but an agency hardly could be comfortable that a court would sustain a position that no advisory committee is involved in negotiated rulemaking.

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[409] The quoted phrases are the predicates for satisfying the definition of advisory committee, contained in §3 of the Act. 5 U.S.C. App.2 (1982).

[410] Such a delegation would present other legal problems, discussed in §8.3 of this report.

[411] Some support for this position and other theories supporting closed meetings of caucuses and subgroup meetings can be found in cases decided under the Sunshine Act. See FCC v. ITT World Communications, Inc., ___ U.S. ___, 104 S.Ct. 1936 (1984) (informal background sessions or negotiations are not "meetings").

[412] See National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, 557 F.Supp. 524 (D.D.C. 1983), aff'd 711 F.2d 1071 (D.C.Cir. 1983) (task forces chaired by members of Presidential Commission were not advisory committees); Consumers Union v. Department of Health,

Assuming a regulatory negotiation group is an advisory committee, the second question is presented, whether the meetings must be open to the public. Here also, the answer is probably, "yes," although arguments exist that meetings might be closed to protect effective deliberations, especially where the committee membership is balanced.[413]

GSA regulations permit meetings to be closed under the conditions set forth above. Conceivably a regulatory negotiation group could be structured to come within these conditions, by meeting with the agency only for the purpose of exchanging facts or information; initiating meetings rather than having the agency initiate meetings, when the purpose is "expressing the group's view," providing the agency does not use the group as a "preferred source of advice or recommendations; and meeting with the agency only for the purpose of communicating only "the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations." Proceeding within these limitations, however, would distort the negotiation process, and would not alleviate entirely the possibility that a court would find that the spirit of the GSA regulations were violated, or that the regulations contravene the statute. The purpose of regulatory negotiation manifestly is to reach some sort of consensus, and most regulatory negotiation is in fact initiated by the agency.

Ed. & W., 409 F.Supp. 473 (D.D.C. 1976), aff'd 551 F.2d 466 (D.C.Cir. 1977) (presentation by industry group on voluntary program was not advisory committee, where agency lacked authority to regulate subject); Nader v. Baroody, 396 F.Supp. 1231 (D.C.C. 1975) (White House meetings with selected private groups not advisory committee).

[413] Compare Nader v. Dunlop, 370 F.Supp. 177 (D.D.C. 1973) (Act does not permit closing all meetings to protect deliberative consultations among members) with Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C.Cir. 1976) (approving closure of portions of three meetings of total of 20 because intra-agency memoranda within exemption 5 of FOIA had been discussed). See generally, Perritt & Wilkinson, 63 Geo.L.J. at 743-47 (advocating applicability of FOIA exemption 5 to protect deliberative process of advisory committee).

Even if full meetings of the negotiation group must be open, however, strong arguments exist that caucuses and subgroup meetings can be closed.[414] Support for this argument is found in National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control.[415] In that case, the court found that subgroups formed by an advisory committee to provide information and recommendations for consideration to the committee were not themselves advisory committees.[416] It reached this conclusion because the subgroups were not "established or utilized by the agency creating the full advisory committee. Rather the subgroups were established and utilized by the advisory committee, thus taking them out of the literal definition of advisory committee in FACA.[417] Moreover, the court reasoned that Congress could not have intended that

> interested parties . . . should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations.[418]

Additional support for the right to close meetings of subgroups of a negotiating committee is found in the Supreme Court's decision, Federal Communications Commission v. ITT World Communications, Inc.[419] In that case, the Court decided that the Sunshine Act[420] did not require that meetings between a panel of the FCC and foreign officials be open to the public. It concluded that the Congress recognized the necessity of "'informal background discussions that clarify issues and expose varying views' are a necessary part of an agency's work,"[421] and found that applying the Act's requirements to such discussions would "impair normal agency operations without achieving significant public benefit."[422]

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[414] 48 Fed.Reg. 19325 (Apr. 29, 1983) (preamble to GSA regulations).
[415] 557 F.Supp. 524 (D.D.C. 1983).
[416] 557 F.Supp. at 529.
[417] 557 F.Supp. at 529.
[418] 557 F.Supp. at 529.
[419] ___ U.S. ___, 104 S.Ct. 1936 (1984).
[420] As explained above, exceptions to the FACA requirement for open meetings are linked to exceptions to the Sunshine Act open meeting requirement.

Assuming that at least some of the meetings of a regulatory negotiation group must be open, the final question is presented: does it matter? The conventional wisdom conflicts somewhat with the evidence drawn from the competed negotiated rulemaking experiments. The conventional wisdom is that public meetings will chill the negotiation process, for the reasons detailed in §2.3. The experience of the benzene, flight and duty time, NCP, and pesticide exemption participants, however, suggests that the nominally open meetings made little difference to the negotiations, remembering that FACA was interpreted in those negotiations as permitting closed meetings of subgroups and caucuses.

There are two reasons for the difference between expectations and experience. The first reason is that more sensitive exploration of concessions almost always takes place away from the formal negotiating table and therefore outside formal meetings of the negotiating group. Therefore where the potential for harm from public scrutiny was greatest, it could not easily penetrate: luncheon or cocktail conversation, telephone calls, informal meetings of fewer than all the participants. The second reason is that no one from the press or the non-participant public made much of an issue of caucuses or subgroup meetings being closed, nor did the negotiations result in much publicity. There is reason to believe that public and press interest in regulatory negotiation may increase, increasing the potential risk posed by the public meeting requirement. If regulatory negotiation becomes more common, and is applied to highly controversial issues, press or public interest representatives probably will become more aggressive in reporting on negotiations and in insisting that FACA be observed rigorously. Such a trend could result in greater FACA impediments to the negotiations process. On the other hand, practical ways of conducting business away from public meetings almost certainly will continue to be found.

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[421] ___ U.S. at ___, 104 S.Ct. at 1940 (quoting Senate Report on Sunshine Act).

[422] Id.

CHAPTER 9

CONCLUSIONS AND RECOMMENDATIONS

§9.1 Introduction

This chapter presents conclusions and recommendations derived from the analysis of negotiated rulemaking contained in the preceding eight chapters.

§9.2 Conclusions

Negotiations have proven to be effective in some circumstances in developing widely acceptable proposals for agency rules. Experience has shown that "Negotiated Rulemaking" is a practical alternative to Notice-and-Comment or Hybrid Rulemaking, and that Recommendation 82-4 is basically sound. Some parts of the recommendation need amplification, however. ACUS should consider issuing further recommendations because interest in negotiated rulemaking is growing, and it is natural for interested persons to wonder how 82-4 has worked out in practice.

It is important to view the original recommendations and those contained in this report as a guide to issues to be considered rather than a formula to be followed. Negotiation intrinsically is process that cannot be specified entirely in advance.[423] Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by affected parties, past relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views among individual units within each constituency represented, and the skill of agency personnel and mediators. Some of these variables, or particular configurations of variables existing when negotiations commence, almost certainly will change several times before negotiations conclude. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, the definition of consensus, either in general or in the context of a particular proceeding.

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[423] A similar conclusion has been reached with respect to negotiation of state regulatory issues. See J.Brock, Developing Systems for the Settlement of Recurring Disputes (Sept.1984) (unpublished manuscript available from The Mediation Institute, 605 First Ave, Suite 525, Seattle, WA 98104, (206) 624-0805).

Agencies undertaking negotiated rulemaking must be prepared to deal with these real-world uncertainties. An agency cannot expect that the pattern followed successfully by another agency, or even by itself on another issue, can be transplanted automatically to another negotiation without modification. Elements of Recommendation 82-4 and the recommendations contained in this report should be taken as a conceptual framework with which to design actual negotiations in a particular proceeding, and not as a formal model. Agencies that are considering negotiated rulemaking for the first time should read the body of this report and other literature on negotiations to understand the subtleties of negotiated rulemaking. Such agencies also will find it helpful to discuss their plans with persons experienced with the process.

The provisions of Recommendation 82-4 relating to defining participation in negotiations is basically sound. Who needs to be included at the outset is determined by the same criterion as who needs to agree with the negotiating result: whoever's opposition to the negotiating result is likely to be fatal -- or at least to pose a risk unacceptable to the participants. Thus if X, by litigating or inducing OMB or the Congress to intervene, is unlikely to be able to affect the result, there is no need to include X in the negotiations; nor is it important whether X, having been included, agrees with the negotiation result. On the other hand, if X is likely to be able to affect the result significantly, there are stronger incentives to include X and to ensure that X agrees with the result of the negotiation. In other words, the need for X's agreement is a continuous function of X's power to litigate successfully in the rulemaking proceeding and in the courts. This, in turn is a function of how much X cares, X's resources, and the probable merits of X's position.

Representation should be addressed through an initial Federal Register notice, providing an opportunity for additional parties to request participation. The approach followed by the FAA and EPA worked well. The agency sponsoring negotiated rulemaking should specify an initial list of participating interests and representatives, allowing comment and requests for additional participation. The FAA experience shows the utility of this step. It permits subsequent criticisms of the process to be deflected.

There may be a "displacement" problem with overly formal procedures for defining participants, however. The effort to reduce formal litigation over content of the rule and APA procedures may result in litigation over the representation process, thus frustrating realization of the original goal of negotiation.

Recommendation 82-4 is also basically sound with respect to defining consensus. As it suggests, agencies and negotiators should take a flexible view toward defining "consensus." Insisting on formal subscription to a "total package" recommendation may make negotiating success impossible; it may be infeasible for a participant to acknowledge agreement with a compromise.[424] Especially if the agency participates in the negotiations, formal, total-package agreement is not necessary. Any reasonably sophisticated agency participant will have a sense when negotiations are concluded as to what a given party can live with and what will be so obnoxious to that party that it will be moved to litigate. A sophisticated agency participant also will have a sense of what concessions are linked to gains on other issues. Moreover, a flexible attitude toward consensus may permit substantial agreement on a framework for a rule with certain difficult issues reserved for adversarial comment and decision by the agency. In other words, a consensus can include an agreement to dispute certain issues before the agency or in the courts. Such an outcome still provides the benefit of narrowing the issues. The FAA experience is a good example.

On the other hand, a total-package ground rule forces the parties to make more compromises, instead of leaving tough issues for the agency to resolve.

One possible rule of thumb for a consensus rule is to say that a consensus has been obtained when all participants agree informally that they will not actively oppose a particular resolution of issues, though certain of their constituents might register formal opposition.

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[424] Everyone with labor-management negotiation experience is familiar with the common phenomenon in grievance dispute processing where labor and management reach _de facto_ agreement on resolution of a grievance but need an arbitrator's decision to "take them off the hook." In some cases, the disputing parties actually write the arbitrator's decision.

In considering the cost of negotiated rulemaking, agencies should explore resources available from government agencies, such as mediation services from the Federal Mediation and Conciliation Service, or the Community Relations Service within the Justice Department, and negotiation training available from the Department of Justice.

The four agency experiences do not show that the Federal Advisory Committee Act, as interpreted by the sponsoring agencies and participants, was a serious impediment to effective negotiations. The purpose of the Act is satisfied when a properly balanced rulemaking negotiation is conducted, and the statute should not impose additional requirements that jeopardize the success of negotiation. There is no reason to believe, under current judicial and agency interpretation of the Act, that caucuses and other working group meetings may not be held in private, where this is necessary to promote an effective exchange of views. Agencies should not be deterred from considering negotiated rulemaking by a perception that the negotiating group will be an "Advisory Committee" under the Act. Accordingly, the Administrative Conference should make no further recommendation pertaining to the Federal Advisory Committee Act at this time. Some uncertainty can be reduced, however, if the GSA amends its regulations to make it clear that meetings of caucuses and subgroups can be closed.[425] The recommended amendment is consistent with judicial interpretations of the Act.[426]

It is premature to consider amendments to the APA. The APA itself was a product of several decades of experimentation and evolution of concepts at the agency level, in the context of specific decisions. More experimentation and evolution of negotiated rulemaking concepts is necessary before sound views can exist on whether APA amendments are desirable and, if they are, what form they should take. The risk of amending the APA now is that flexibility to adapt the negotiation process to the needs of different regulatory situations might be destroyed.

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[425] See Þ2 of ACUS Recommendation 82-4.

[426] See §8.6.

An example of reduced flexibility is S.451, introduced by Senator Levin.[427] The bill contains a number of desirable provisions, especially those relating to coverage by the Federal Advisory Committee Act and the procedure for closing negotiation group meetings. In other respects, however, it confines the negotiation process too narrowly, especially with respect to definition of consensus,[428] selection and role of mediators,[429] and continued activities of a negotiating group after it has reached consensus and made a recommendation to an agency.[430]

After the text of a rule is negotiated, the agency should publish it as an NPRM, allowing public comment, and articulating its own rationale for the rule finally adopted.[431] APA review of a negotiated rule can be protected by negotiated agreement as to what the parties will put in the rulemaking record, and what the agency will say in support of the rule.

§9.3 Recommendations

1. An agency sponsoring a negotiated rulemaking should take part in negotiations. Agency participation can occur in various ways, for example, participating fully as a negotiator, or being present as an observer and commentator on possible agency reactions and concerns. Agency representatives in negotiations should be sufficiently senior in rank to be able to express agency views with credibility. Agencies should use negotiations, when they are undertaken, as the agencies' primary channel for communicating with the parties. The utility of negotiating is an inverse function of group influence outside the negotiations, by direct dealings with the agency, by contact with OMB, by litigating in the courts, and by lobbying with the Congress. The willingness of a group to participate

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[427] 131 Cong.Rec. S.1350 (Feb.7, 1985).

[428] §4(8), S.451, 131 Cong. Rec. at S 1350.

[429] §6, S.451.

[430] §7(h) of S.451 contemplates termination of a negotiating group before it has an opportunity to review comments submitted in response to its recommended rule.

[431] Such an opportunity for comment is required by the APA. 5 U.S.C. §553 (1982).

meaningfully in negotiated rulemaking is likely to be affected by the group's perception of its ability to influence the content of the rule through other channels. A group that has a low estimate of its influence with the agency may embrace negotiations as a way of participating equally with other interests: an improvement of what it perceives its effect would be in more traditional notice-and-comment rulemaking. Conversely, a group that believes it has high influence with the agency may view negotiations as reducing reduce its influence and thus may be more reluctant to participate meaningfully. Similarly, a group that has been successful in judicial challenges to agency decisions is more likely to prefer the litigation alternative to negotiations. And a group perceiving itself with substantial influence at OMB or in the Congress is less likely to be enthusiastic about negotiating. Of course the willingness to negotiate is not dichotomous; the factors that make a group less willing to participate may permit it to participate, but not to be willing to make many changes in its position.

Participation by the agency -- and by OMB[432] -- reduces the real or perceived potential for parties to undermine the negotiating process by making "end runs" to the agency or to OMB. Agency participation also affords an opportunity for greater access to the agency than some parties might expect to have in hybrid rulemaking. Participation also increases the likelihood that the agency and OMB will support, and understand the basis of, negotiated recommendations. Participation increases the range of options available regarding consensus. The same logic might militate in favor of Congressional staff participation in some negotiations. If, for some reason, agency or OMB participation is not acceptable, the facilitator/mediators should serve as a channel between the negotiations and OMB and Congressional staff.

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[432] Some agencies and commentators question the appropriateness of OMB participation, arguing that it is the agency's responsibility to obtain OMB concurrence in any proposed regulation. The whole point of negotiations, however, is to get all the interests likely to influence the substance of a regulation to communicate directly with each other. Under Executive Order 12291, 46 Fed.Reg. 13193 (Feb. 17, 1981), reprinted as note to 5 U.S.C.A. §601 (West 1985 Supp.), OMB has a major role to play. Evidence from the benzene negotiations suggests strongly that Industry's position was determined in significant part by what it thought OMB would do with a unilateral OSHA proposal. Such perceptions should be tested and taken into account in the negotiations themselves, rather than outside. The FAA and EPA experiences show that OMB can express support for negotiations and can participate in various ways. At a minimum, agencies considering negotiated rulemaking in a particular proceeding should have a clear strategy for obtaining OMB support and for involving OMB as negotiations proceed. This may be accomplished using facilitator/mediators as intermediaries.

There are of course various forms that agency participation can take. In most cases, the agency should be represented on the committee and should ask questions and try to gain information from participants, in order to gain substantive knowledge and also to probe where a party's "soft spots" are in its position. Experience suggests, however, that the agency should avoid pushing the participants toward one result or another. That kind of participation can stifle debate. There is a fine line between an agency's showing its hand too early and, on the other hand, offering a proposal in an effort to stimulate movement in the negotiations and to remind participants what the prospects of deadlock may be.

The early proponents of negotiated rulemaking recognized two forms of negotiated rulemaking, one in which the agency participates in the negotiations ("Agency Participation Model,"), and another in which it does not ("Agency Oversight Model,").[433] This recommendation does not contemplate that the "agency oversight" model never would be useful. The parties might be motivated so strongly to negotiate a resolution of their disagreements that agency participation is unnecessary.[434]

2. Negotiations are unlikely to succeed unless all parties, including the agency, are motivated throughout the negotiations by a perception that a negotiated rule would be preferable to a rule developed under traditional processes. To foster this belief, as an incentive to negotiating an agreement, the agency should be sensitive to each participant's need to have a reasonably clear expectation of

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[433] See Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv.L.Rev. 1871, 1875-76 (1981); Harter, 71 Geo.L.J. at 57-58.

[434] The cotton dust negotiation is a clear example. See §6.3.

the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency may need to communicate with other participants -- perhaps with the assistance of a mediator or facilitator -- to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Agencies should understand the major influence they have on party expectations and therefore on party BATNA's.[435] The utility of participation for a party is properly understood in terms of the likelihood of a negotiated settlement that is equal to or better than every party's BATNA; else no consensus settlement can emerge. This means that the agency must be willing to communicate selectively to the parties possibilities for agency action that the particular party receiving the communication will find unfavorable. Just like a judge seeking to induce private litigants to settle a lawsuit, the agency, as decisionmaker, must point out the flaws in each party's argument and position, and ensure that each party understands why the outcome of agency action in the absence of negotiated agreement may not be as favorable as the party thinks.

Agency participation in negotiations, addressed in Recommendation Number 1, promotes realistic party expectations. Agencies also can promote realistic party expectations by preparing draft rules or outlines and making them available to other parties. Instead of fearing premature disclosure of tentative staff views, the agency should welcome disclosure of such views, because they can educate affected interests on what the agency might do in the absence of a negotiated rule. In addition, such drafts can form a useful framework or agenda for negotiations.

Such conditioning of party expectations by the agency is delicate; it can reinforce party fears that the agency will not participate in the negotiations in good faith, or can chill meaningful party contributions by signalling that the agency has its mind made up.

Of course, much of this conditioning of party expectation can be done by the facilitators, but facilitator representations regarding agency intentions will not be credible for long unless the agency acts so as to reinforce the representations.

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[435] The BATNA concept is explained in §2.3.

3. Agencies should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments are received on the notice, as contemplated by paragraphs 13 and 14 of Recommendation 82-4. Agencies considering negotiated rulemaking should be creative in exploring where negotiations best fit. The Harter model and all of the completed negotiated rulemaking efforts envision negotiations over the content of an NPRM, before it is issued. It is likely that this is the best time for negotiations to occur.

Negotiations also can begin, however, after an NPRM is published.[436] In post-NPRM negotiations, the NPRM could sharpen the issues to be dealt with by the negotiators, and could make certain options more concrete and less theoretical.[437] Post-NPRM negotiations are more vulnerable to APA ex-parte communication criticisms,[438] but the agency can mitigate these concerns by putting minutes of post-NPRM negotiating sessions in the rulemaking record. When negotiations begin after a record is developed on an NPRM, through hearings or otherwise, the agency could sit down with participants to decide, "what conclusions should we draw from this record?" In other words, the "negotiation" would be a series of informal meetings with parties to the hybrid rulemaking hearings. There is no reason the relevant statutes preclude this procedure; FACA open meeting requirements might be handled under the litigation exception,[439] and representation problems already might have been resolved in connection with the rulemaking hearings.[440]

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[436] Post-NPRM review of comments occurred at FAA and EPA as a continuation of pre-NPRM negotiations, but the point made in the text is that negotiations might be commenced after an NPRM is issued, as occurred with the cotton dust controversy.

[437] In some respects, the benzene negotiations benefitted from such sharpening, because of the earlier litigation.

[438] See §8.4.

[439] See 5 U.S.C. §552b(c)(10) (1982), applied to advisory committees by FACA §10 (authorizing closure of meeting concerning determination of a matter on the record after opportunity for a hearing).

4. An agency sponsoring a negotiated rulemaking proceeding should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person selected may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator/facilitator is not necessary. There are advantages and disadvantages of outside and inside facilitators. "Inside" facilitators may be inhibited in dealing with intra-constituency problems and in intervening with other agencies of government, such as OMB. In addition, private parties may be reluctant to accept the "neutrality" of a facilitator from within the agency. On the other hand, the use of an inside facilitator in the Pesticide negotiations worked well, and in appropriate cases, inside facilitators may be effective.

Mediation skills are highly personal, and it would be unwise to establish any exclusive institutional source of rulemaking mediation services. It may be desirable, however, to organize training and educational programs and to procure mediation services competitively, to ensure that opportunities for potential neutrals are distributed equitably. If competitive procurement occurs however, it is essential to ensure speed, and to have a process for ensuring that bidders are qualified by mediation experience.

5. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking, should be prepared to address disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator/facilitator to mediate internal issues within a constituency. Agencies should consider the potential for constituency disagreements in choosing representatives, in planning for a successful negotiation, and in selecting persons as mediators or facilitators.

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[440] See Food Chemical News, Inc. v. Davis, 378 F.Supp. 1048 (D.D.C. 1974); Consumers's Union v. Department of Health, Education and Welfare, 409 F.Supp. 473 (D.D.C. 1976), aff'd without opinion, 551 F.2d 466 (D.C.Cir. 1977).

Students of negotiation long have recognized that the most difficult challenge to a negotiated agreement involves, not the process at the negotiating table, but the process of resolving intra-constituency disagreements away from the table. This does not mean that the proponents know in advance exactly how to "resolve" such disagreements; only that the convenors assess the likelihood that such disagreements will occur, understanding the adequacy of existing institutional mechanisms for resolving them.

Intra-constituency problems may be more difficult under certain types of interest representation arrangement than others. For example, trade unions exist for the purpose of aggregating employee interests, and therefore are experienced in resolving differing positions within the constituency; similarly, public interest groups have a certain authority in speaking for their otherwise diffuse constituencies. Business interests, in contrast, usually have fewer established mechanisms for resolving internal differences. (Exceptions might be found in those industries long subject to economic regulation).

If such internal differences are expected to be substantial, and if existing institutions are not well suited for resolving them, negotiation should not proceed in the absence of a mediator who has the experience, skill, and acquaintance with the constituency and its major personalities. Such a mediator may be able to reduce intra-constituency differences thereby validating the authority of the spokesperson for the affected group. In some cases, a special mediator might be retained to assist the main facilitator/mediator in dealing with an internal constituency problem.

The potential for internal constituency disagreements also should influence selection of interest representatives. If a trade association may be unable to represent it constituents effectively, it may be desirable to include individual company representatives. It also may be desirable to convene subgroups of major sub-interests, to provide the mediator or facilitator with a forum in which to adjust internal constituency disagreements.

Agencies and mediators or facilitators should be wary, however, of fragmenting representation too much; permitting sub-interests to be represented separately merely moves disagreements among these sub-interests from other resolution forums to the bargaining table itself.

6. Where appropriate, the agency, the mediator/facilitator, or the convenor should consider

appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. A similar procedure may also be desirable in to permit neutral technical advice to be given in connection with complex data. Use of such a neutral could alleviate concerns with disclosure of proprietary information to competitors or to the public that otherwise might frustrate negotiating progress. Similarly, microcomputers and appropriate software may be helpful to the negotiators in evaluating the implications of different approaches, as it was in the NCP negotiations.

7. Agencies should be mindful of the potential value of providing the parties with an opportunity to participate in training to enhance negotiation skills, before substantive negotiations begin. Training provided in connection with the EPA negotiations was well received, and parties to the planned negotiation of Farmworker Protection standards have asked for similar training.

8. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs, incurred by participants or expended on behalf of the negotiating group. Creation of such a pool from contributions by participants and the agency may be considered in the pre-negotiation stages of consideration.

9. ACUS should investigate means of resolving intra-constituency disagreements, with particular attention to difficulties experienced by API in the benzene negotiations, and by ATA in the Flight-and-Duty-Time negotiations. Negotiations are unlikely to be successful if serious internal disagreements exist within a represented interest and cannot be resolved. Such disagreements were the focus of trade association and mediator effort in the OSHA and FAA negotiations, with differing success. This subject is worth further in-depth investigation in order to identify mediation or representation approaches that facilitate resolution of intra-constituency differences.

10. As OSHA pursues its initiative to negotiate an MDA standard, ACUS should monitor the activity to permit detailed comparison with benzene negotiations. Many of the characteristics of the benzene negotiations appear to be unique to health standards controversies involving the AFL-CIO and major Industry groups. OSHA intends to involve these groups under a different negotiating procedure than was used in the benzene negotiations, in order to develop a standard for MDA. When the MDA effort has run its course, it can be compared fruitfully with the benzene effort.

11. ACUS should investigate use of microcomputers for modelling and telecommunications in connection with rule negotiations. A microcomputer was used by the NCP negotiators to model alternatives considered in the negotiations. The negotiators found this computer aid helpful. Negotiators in another EPA negotiation, involving Farmworker Protection, have arranged to use microcomputers for telecommunicating documents. This technology appears to afford significant benefits for a variety of rule negotiations. ACUS should develop information on useful applications of microcomputers for future efforts at negotiated rulemaking.

BACKGROUND REPORT
FOR
1985 STATEMENT

BACKGROUND REPORT FOR STATEMENT 11

Scientific Issues and The Function of Hearing Procedures: An Evaluation of FDA's Public Board of Inquiry

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This report was prepared for consideration by the Office of the Chairman of the Administrative Conference of the United States. It represents only the views of the author and not necessarily those of the Conference or the Office of the Chairman.

I. INTRODUCTION

II. SCIENTIFIC DISPUTES AND THE FUNCTION OF HEARING PROCEDURES

- A. The Nature of the PBOI Procedures
- B. The Nature of Scientific Evidence
  - 1. Animal and Clinical Data
  - 2. Epidemiological Data
- C. The Nature of Hearing Procedures
- D. Nature of Scientific Input
  - 1. The Rationale for Scientific Input
  - 2. Models of Scientific Input
  - 3. The Rationale For the PBOI

III. EVALUATION OF THE PBOI PROCEDURE

- A. The "Aspartame" Case
  - 1. Statutory Standards
  - 2. Pre-Hearing Process
  - 3. Hearing Process
  - 4. Post-Hearing Process
- B. The "Depo-Provera" Case
  - 1. Statutory Standards
  - 2. Pre-Hearing Process
  - 3. Hearing Process
  - 4. Post-Hearing Process
- C. Analysis of the Process
  - 1. The Pre-Hearing Process
    - a. Choice of the PBOI
    - b. Formulation of the Issues
    - c. Choice of Board Members
      - (1) Selection of Members
      - (2) Nomination Process
    - d. Other Pretrial Procedures
  - 2. The Hearing Process
    - a. Quality of the Process
    - b. Flexibility of the Process
    - c. Open Nature of the Process
  - 3. The Post-Hearing Process
    - a. Time-Delays
    - b. Inattention to Traditional Procedures
    - c. Appropriate Standard of Review

IV. FUTURE OF THE PBOI PROCEDURE

- A. *The PBOI At FDA*
- B. *The PBOI At Other Agencies*
- C. *Conclusion*

V. LISTING OF CONCLUSIONS

I. INTRODUCTION

The implementation of health and safety laws often requires a determination whether particular chemicals are carcinogenic or are otherwise harmful to persons exposed to them. The Food and Drug Administration (FDA) has created and used twice a unique procedural mechanism, the Public Board of Inquiry (PBOI), to address such questions. The PBOI is a panel of three scientists who replace the Administrative Law Judge (ALJ) in the agency's hearing process. Hearings before the PBOI are in the nature of a "scientific seminar" in which most of the traditional hearing procedures are eliminated including the direct participation of lawyers.[1]

The development of effective decision-making techniques for scientific disputes has been one of the most elusive problems for the administrative process.[2] Many scientists and others have supported the idea of a "science court" or an institution to which administrative agencies could refer scientific disputes for resolution by expert scientists.[3] In response, several methods of obtaining scientific input have been developed. The PBOI, however, is unique because it replaces the function of an ALJ, because it is composed of independent, expert scientists, and because it uses informal hearing procedures.

FDA has held two PBOI proceedings. In 1980, a PBOI was convened to determine whether Aspartame, a widely used artificial sweetener sold under the brand name Nutra-Sweet, should be licensed as an artificial sweetener.[4] In 1983, a PBOI was convened to determine whether Depo Provera, a new drug approved as a contraceptive in practically every country but the United States, should be licensed for that use.[5] This study evaluates these agency proceedings to determine the usefulness of the PBOI as a means by which disputes concerning scientific issues can be effectively and fairly resolved.

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[1] See infra notes 18-19, 76-78 and accompanying text.

[2] See Carrow & Nyhart, Introduction, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 1 (J. Nyhart & M. Carrow eds. 1983).

[3] See infra § 3A.

[4] See infra notes 128-179 and accompanying text.

[5] See infra § 3B.

The study is divided into three parts. Part I considers the nature of scientific disputes and the role of hearing procedures in their resolution. Part II describes the nature of the Aspartame and Depo Provera proceedings and analyzes the effectiveness of those proceedings. FDA's experiences support the general merits of the science court idea, but the marriage of scientific expertise and the regulatory process is not easily accomplished. Part III considers the possible future of a PBOI type of process in the administrative process. Part III concludes that experimentation with a PBOI type of process should continue at FDA and at other health and safety agencies.

II. SCIENTIFIC DISPUTES AND THE FUNCTION OF HEARING PROCEDURES

A. The Nature of the PBOI Procedures

The Food, Drug and Cosmetic Act (FDCA) requires FDA to hold a "hearing" to resolve any controversy concerning the approval of food additives and new drugs.[6] This hearing, which is called a "formal evidentiary hearing," constitutes formal adjudication under the Administrative Procedure Act (APA).[7] Since 1976, FDA has offered parties entitled to a formal evidentiary hearing a choice of three alternative, informal methods by which their disputes could be resolved: a hearing before a Public Board of Inquiry (PBOI),[8] before an advisory committee,[9] or before the Commissioner of FDA.[10]

The Commissioner will grant a request for a PBOI from a party entitled to a formal evidentiary hearing when "it is in the public interest . . . ."[11] Any person may become a participant by filing a notice to that effect.[12] The Commissioner then chooses three scientists to serve as a three-member hearing board from persons nominated by the participants.[13] He must choose one Board member from nominations by the FDA staff or from nominations by the person who sought the PBOI. He must choose a second from nominations by the other participants in the hearing. The Commissioner has discretion to choose the third member who will serve as chairperson.[14] Members of the Board are to have "medical, technical, scientific, or other qualifications relevant to the issues to be considered."[15]

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[6] 21 U.S.C. §§ 348(f), 355(c)(2) (1982).

[7] See R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.4.2 (1985).

[8] 21 C.F.R. §§ 13.1-.50 (1985).

[9] Id. at §§ 14.1-.174.

[10] Id. at §§ 15.1-.45.

[11] Id. at § 13.1(a) & (c). The PBOI process starts with a hearing notice published in the Federal Register. Id. at § 13.5.

The decision of the PBOI has the same legal status as an "initial decision" of an ALJ.[16] Further, the PBOI is subject to the requirement of separation of functions and the prohibition against ex parte contacts.[17] Nevertheless, FDA requires that "the proceedings of a Board are conducted as a scientific inquiry rather than a legal trial."[18] As a result, all participants are given the opportunity to make uninterrupted oral presentations and only the Board members are allowed to ask questions of the witnesses. Participants, however, may briefly comment on the presentations and suggest questions to the Board.[19] Additionally, the Board may ask consultants of its choice, paid by FDA, to make presentations at the hearing.[20] At the conclusion of the hearing, participants may submit written statements of their positions with proposed findings and conclusions.[21]

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[12] Id. at § 13.5(a)(2).

[13] Id. at § 13.10.

[14] Id. at §13.10(b). Participants in the PBOI may also agree to an alternative method of selecting the Board. Id. at §13.10(d).

[15] Id. at §13.10(a).

[16] Id. at § 12.32(f)(1). The Board acts as an FDA consultant and is not subject to the Federal Advisory Committee Act. Id. at § 13.10(e).

[17] Id. at § 13.15.

[18] Id. at § 13.30(a).

[19] Id at 13.30(c).

The PBOI is a a substantial departure from a conventional hearing.[22] Both the role of lawyers and of the advocacy process are minimized in favor of a "scientific forum." To evaluate this deemphasis of adversary techniques, the next three sections consider the nature of scientific evidence, of hearing procedures, and of scientific input.

B. The Nature of Scientific Evidence

Significant changes have been made in the administrative process to develop effective techniques to resolve scientific issues.[23] These changes recognize that the evaluation of scientific evidence requires both scientific expertise and regulatory or policy-making expertise. This section explains why both types of expertise are necessary. The next section explains the nature of the changes that have occurred.

Health and safety regulatory agencies are required to determine whether chemicals are sufficiently "safe" for human exposure or consumption. FDA's responsibilities include the determination of whether food and color additives are "safe"[24] and whether pharmaceutical drugs are "safe" and "effective".[25]

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[20] *Id.* at §13.30(f).

[21] *Id.* at § 13.30(e) & (i).

[22] Hearings before Advisory Committees and the Commissioner, because they are similar to a PBOI, are also significant departures from a conventional hearing. *See id.* at §§ 14.1-.55, 15.1-.45.

[23] *See infra* § 2C.

[24] 21 U.S.C. §§ 348(c) & 376(a) (1982); *see infra* § 3A1 (explanation of additive regulation).

[25] 21 U.S.C. § 355(b) (1982); *see infra* § 3B1 (explanation of new drug regulation).

the Environmental Protection Agency (EPA)[26], the Occupational Health and Safety Administration (OSHA)[27], and the Consumer Product Safety Commission(CPSC)[28] have responsibilities that involve analogous scientific determinations.

These agencies consider three sources of scientific evidence to make safety determinations for chemicals.[29] A chemical may have been tested in experimental animals or in humans in clinical experiments.[30] There may also be epidemiological data indicating what effects the chemical has had on those exposed to it.[31]

The evaluation of this type of scientific evidence requires three types of conclusions.[32] First, an agency must engage in "data determination" to determine the results of the experiments or studies. Second, an agency must engage in "data interpretation" to determine the scientific significance of those results. This process requires a conclusion whether the methodology used in the studies was scientifically valid. Finally, the agency engages in "data extrapolation" to predict the consequences of human exposure to the chemical based on the results of studies considered to be valid.

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[26] The Environmental Protection Agency monitors the safety of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982).

[27] The Occupational Safety and Healthy Administration monitors the safety of exposure to chemicals in the workplace. 29 U.S.C. § 655 (1982).

[28] The Consumer Product Safety Commission monitors potentially hazardous substances marketed to the general public. 15 U.S.C. § 1262 (1982).

[29] *See* Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1233-36 (1984); McGarity & Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837, 868 (1980); Shapiro, *Limiting Physician Freedom to Prescribe a Drug for Any Purpose: The Need for FDA Regulation*, 73 N.W. U.L. REV. 801, 803 (1978) [hereinafter cited as *Limiting Physician Freedom*]; Shapiro, *Divorcing Profit Motivation from New Drug Research: A Consideration of Proposals to Provide the FDA with Reliable Test Data*, 1978 DUKE L.J. 155, 157-58 (1978)[hereinafter cited as *Divorcing Profit Motivation*].

[30] *See Limiting Physician Freedom, supra* n. 29; *Divorcing Profit Motivation, supra* n. 29, at 158-61.

[31] *See* Schroeder & Shapiro, *supra* note 29, at 1233-36.

[32] *See infra* notes 36-45 and accompanying text.

The nature of these three types of conclusions ranges from those that are purely factual, in the sense that they are capable of objective determination, to those that are matters of judgment, in the sense that reasonable persons can disagree concerning them. Judgmental conclusions are of two types. They can be "scientific" in nature, in the sense that they require the application of scientific knowledge and experience, or they can be "regulatory" in nature, in the sense that they require the application of legal or policy-making knowledge and experience.[33] The next section explains how an agency evaluates scientific evidence in the context of animal, clinical, and epidemiological data.

1. Animal and Clinical Data

In animal experimentation, investigators compare the health of animals in a "test" group and a "control" group. Only the test group is administered the chemical under study, but otherwise the animals are selected and maintained under identical conditions.[34] The aim is to determine whether the animals in the test group have any health consequence not shared by animals in the control group. Human experimentation is conducted on the same basis. Investigators compare the health of persons in a test group and a control group. Only the persons in the test group will be administered the chemical being tested.[35]

To utilize this data, an agency must first determine the results of the experiment. Normally, "data determination" is a purely factual matter. For example, the agency would find whether the test group of animals had any health manifestations not found in the control group. Although this process may require ascertaining the absence of scientific fraud,[36] it does not normally involve any scientific judgment. Data determination, however, can also involve scientific judgment. Pathologists, for example, may interpret tissue samples of animal tumors differently. Some pathologists may consider a tumor located in the tissue to be malignant while others would reach the contrary conclusion.[37]

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[33] See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 GEO. L.J. 729, 731-49 (1979).

[34] See Chemical Carcinogens; A Review of the Science and Its Associated Principles, 50 Fed. Reg. 10,372, 10,412 (1985); Cooper, Saccharin--of Risk and Democracy, 40 FOOD DRUG COSM. L.J. 34, 51 (1985).

[35] See Cooper, supra note 34, at 51.

In "data evaluation," an agency would consider whether the results of the experiment are valid. This assessment depends on whether the result was statistically and biologically significant. An event is statistically significant when it is probable that it was not the result of chance.[38] An event is biologically significant when various aspects of the scientific evidence suggest a causal relationship between the administration of the chemical and the different health result in the test group.[39]

Both types of conclusions involve elements of judgment. Some of the statistical determinations are purely factual, to the extent they involve calculations, but others involve both scientific and regulatory judgments. For example, there must be a regulatory judgment concerning what level of statistical significance the agency will consider sufficient for purposes of regulation to indicate that the result was not the product of chance.[40] Biological significance involves scientific judgment because the evaluation of a specific study requires scientific training and experience.[41]

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[36] See Divorcing Profit Motivation, supra note 29, at 165-68.

[37] See McGarity, supra note 33, at 740.

[38] See 45 Fed. Reg. 61,474, 61,478 (1980) (FDA Commissioner's Decision on Cyclamates [hereinafter cited as Cyclamate Decision].

[39] These aspects include whether there was a dose response relationship; how common or rare were tumors (or other manifestations) in the test group; whether there are similar results in other comparable studies; what was the incidence of tumors (or other manifestations) in the test group as compared to the control group; whether there was an acceleration of the onset of the manifestation; and what was the size of the study. Id. at 61,478.

[40] See Cyclamate Decision, supra note 38, at 61,478-480.

In "data extrapolation," an agency would attempt to relate the experimental results to the conditions under which people will come into contact with the chemical. If the chemical has been tested in humans, the agency would consider the degree of similarity between the conditions under which the chemical was tested and the likely conditions under which human exposure actually occurs.[42] If the chemical has not been tested in humans, which is often the situation,[43] the agency must determine how to relate the results of animal experimentation to human contact with the chemical. This type of data extrapolation is particularly difficult. There are potential differences in the extent to which humans will come into contact with the chemical.[44] There are also potential difference in human and animal physiology that will affect the human reaction to the chemical.[45]

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[41] "'Biological significance' . . . involves consideration of biological factors," including study methodology, dose-response relationship, comparison to other studies and determinations of a tumor's rarity. All of these considerations naturally require scientific expertise. Cyclamate Decision, supra note 38, at 61,478. See also Merrill, Federal Regulations of Cancer Causing Chemicals, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 21, 60 & 69-74 (1982).

[42] See Merrill, supra note 41, at 49-50.

[43] See Divorcing Profit Motivation, supra note 29, at 158-61; see also Cooper, supra note 34, at 50; McGarity, supra note 33, at 743.

[44] The problem is that the only practical test method for animal experimentation is to administer large doses of a chemical to the animals. For human safety determinations, however, the regulator must decide whether the chemical causes adverse effects at lower doses of consumption or contact. The agency, therefore must estimate the extent of human contact and whether that amount is above or below the level at which contact is safe. See 50 Fed. Reg. 10,415 (1985); see also, Cooper, supra note 34, at 55-59.

Issues of data extrapolation are also judgmental. For example, whether the results of an animal experiment can be applied to humans, despite their differences, necessarily involves questions of scientific expertise. These conclusions, however, also involve regulatory judgments. A determination of whether a chemical is "safe" requires an agency to interpret its statutory mission. FDA, for example, must apply the requirements of the Delaney Amendment which prohibits the use of any food additive that is carcinogenic in animals or humans.[46] The amendment requires FDA to ban as "unsafe" for human consumption any additive that causes cancer in animals. Other agencies, and FDA in other circumstances, must decide the extent to which they must regulate chemicals when it is found that those chemicals cause adverse health effects in animals.[47]

2. Epidemiological Data

In epidemiological research, investigators compare the prevalence of a disease in a test group of persons who were exposed to a chemical to the prevalence of the same disease in a control group of nonexposed persons. The greater the comparative occurrence of the disease in the test group the more likely it is that the exposure to the chemical caused the disease.[48]

Agencies employ the same three phases of evaluation to assess this type of data. After the results of the data are determined, an evaluation is made whether the difference between the prevalence of the disease in the test and control groups is statistically significant. An agency must also examine the reliability of the methodology of any study.[49] Finally, extrapolation of the results is often required. Since epidemiologists limit the number of persons in a test group because of the costs of acquiring health data about those persons,[50] agencies must determine how the limited size of a study affects its validity[51] and whether the results of the study are valid for persons exposed to the chemical under different circumstances.[52]

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[45] See, e.g., Chemical Carcinogens; A Review of the Science and Its Associated Principles, 50 Fed. Reg. 10,411 (1985); see also Cooper, supra note 34, at 54.

[46] 21 U.S.C. § 348(c)(3)(A) (1982); see also id at § 360(d)(1)(H) (Delaney clause for color additives); id. at § 376(b)(5)(B) (Delaney clause for animal drugs).

[47] McGarity, supra note 33, at 743-47.

[48] Schroeder & Shapiro, supra note 29, at 1233.

C. The Nature of Hearing Procedures

The previous description makes it clear that FDA and other regulatory agencies are commonly confronted with disputes concerning the evaluation of scientific evidence. Disputes are common because the evaluation process requires both scientific and regulatory judgments about which reasonable persons can disagree.[53] These disputes are resolved within the hearing process required by the Administrative Procedure Act (APA),[54] other statutes,[55] and agency rules.[56]

The nature of hearing processes has changed in the last few years, particularly at health and safety agencies. One aspect of these changes has been an increasing dependence on "hybrid rulemaking".[57] FDA has introduced another significant change: the use of a PBOI or "scientific seminar" process instead of an adversarial hearing. Both changes reflect the fact identified in the last section that some questions of data interpretation and extrapolation are regulatory judgments, while others require scientific judgments. The following section considers how the administrative process has evolved to consider the determination of scientific judgments.

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[49] *See* Cyclamate Decision, *supra* note 39, at 61,478. The FDA requires that all studies follow its regulations, found at 21 C.F.R. Part 58 (1985).

[50] Schroeder & Shapiro, *supra* note 29, at 1233-36.

[51] *See* Merrill, *supra* note 41, at 56-57; *see also* Cooper, *supra* note 34, at 53.

[52] *See* Merrill, *supra* note 41, at 69-71.

[53] *See supra* § 2B.

[54] 5 U.S.C. §§ 501-706 (1982).

[55] *See infra* §§ 3A1 & 3B1.

[56] *See*, *e.g.*, *supra*, notes 11-21 and accompanying text.

Under the APA, agencies generally utilize either adjudication (or formal rulemaking) or informal rulemaking.[58] A formal hearing is analogous to a judicial trial, complete with an independent judge (an ALJ) and an oral presentation of evidence subject to cross-examination.[59] Informal rulemaking is analogous to the process of enacting legislation. The agency is not required to use an ALJ or to provide an opportunity for oral testimony and cross-examination. It can act through the far less formal sequence of issuing a notice of its intent to act, providing an opportunity for individuals and groups to comment in writing, and accompanying its final action with a statement of basis and purpose.[60]

The APA's dichotomy reflects Professor Davis' division of facts into two categories: "adjudicatory facts" and "legislative facts." In Davis' categorization, adjudicative facts answer "the questions of who did what, where, when, how, why, with what motives or intent"; legislative facts "are general facts which help the tribunal decide questions of law, policy and discretion."[61]

The framers of the APA envisioned that formal hearings would be reserved for matters in which disputes concerning

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[57] See infra notes 70-72 and accompanying text.

[58] See R. PIERCE, S. SHAPIRO & P. VERKUIL, supra note 7 at § 6.4.

[59] See 5 U.S.C. at 554-557; see generally, R. PIERCE, S. SHAPIRO & P. VERKUIL, supra note 7, at 6.4.

[60] See 5 U.S.C. at §553; see generally R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 7, at §6.4.

[61] Davis, The Requirement of a Trial-Type Hearing, 70 HARV. L. REV. 193, 199 (1956).

"adjudicatory facts" were prominent.[62] This choice was based on the assumption that the resolution of such disputes required the use of highly developed advocacy procedures,[63] of separation of functions,[64] and of an ex parte contacts prohibition.[65] The choice of an informal rulemaking for the production of regulations was based on the assumption that the resolution of disputes concerning "legislative facts" did not require the same type of highly developed advocacy process.[66] Further, informal rulemaking procedures were thought to be more advantageous for the promulgation of rules because it allowed the participation of all interested parties and because it was more efficient.[67]

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[62] DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 43 (1941) [hereinafter cited as FINAL REPORT].

[63] See 5 U.S.C. §§ 554-557 (1982); See generally K. DAVIS, ADMINISTRATIVE LAW § 5.01 (1958); FINAL REPORT, supra note 62, at 43. In a formal hearing, accuracy is enhanced by the structured, incremental presentation of evidence, the right to address and rebut evidence, and the relatively unlimited right to cross-examination, see Harter, Negotiating Regulations: A Cure for Malaise, 71 GEO L.J. 1, 19 (1982); see also Kennedy, The New Vogue in Rulemaking at FDA: A Foreword, 28 FOOD DRUG COSM. L.J. 172, 174 (1973); Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness of Social Welfare Claims, 59 CORNELL L. REV. 772, 776 (1975); Hamilton, Rulemaking on a Record by the Food and Drug Administration, 50 TEX. L. REV. 1132, 1155 (1972). It is also promoted by the presence of an Administrative Law Judge (ALJ) expertly trained in the rules of evidence and procedure. See 5 U.S.C. § 556(b) (1983); FINAL REPORT, supra note 62.

[64] 5 U.S.C. at § 554(d); see generally, PIERCE, SHAPIRO & VERKUIL, supra note 7, at § 6.4.3.

[65] See 5 U.S.C. § 557(d) (1982); see generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 161-62 (1983)[hereinafter cited as ACUS Guide]; DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 VA. L. REV. 257, 305 (1979).

[66] Davis, supra note 61, at 199, 214-18.

Since the 1960s, the use of formal hearings has been deemphasized in two ways. Agencies have adopted summary judgment mechanisms to avoid the use of such hearings.[68] They have also promulgated generic rules to remove certain issues from litigation during the hearings.[69] At the same time, the use of informal rulemaking has been deemphasized. Most health and safety agencies are required to use hybrid rulemaking procedures.[70] To promulgate a rule, these agencies are required to use procedures in addition to those the APA requires for informal rulemaking. The additional procedures that are required usually include an obligation to hold a hearing before a regulation is promulgated.[71] These hybrid requirements, however, did not include all of the procedures used in formal hearings. For example, if an agency is required to hold a hearing, parties may not have the right to cross-examine witnesses or if cross-examination is allowed, parties can use it only in certain circumstances or only for certain purposes.[72]

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[67] See Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921, 932 (1965)(Informal procedure allows more opportunity for prior planning and thus a better allocation of limited resources.); Hutt, Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act, 28 FOOD DRUG COSM. L.J. 177, 183 (1973)(Rulemaking is the "most effective and efficient method of regulation."); ACUS Guide, supra note 65, at 79-80 (informal procedures provide wider coverage and a more systematic address to policy, and reduce litigation costs).

[68] See, e.g., 21 C.F.R. § 12.93 (1984)(FDA's summary judgment rule); see McGarity, supra note 33, at 759 n.140 (EPA's proposed summary judgment rule); 10 C.F.R. § 2.749 (1985)(NRC's summary judgment rule); see generally McGarity, supra note 33, at 759-66 (discussion of FDA and EPA summary judgment procedures); Ames & McCracken, Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study, 64 CALIF. L. REV. 14, 17-49 (1976) (discussion of FDA's use of summary judgment).

[69] See McGarity, supra note 33, at 754-59 (discussion of OSHA's generic rulemaking procedures); see generally Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485, (1970)(discussion of FTC, FCC, CAB & NLRB rulemaking); Note, The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing, 61 VA. L. REV. 869, (1975)(discussion of NRC's efficient, but ad hoc, use of generic rulemaking for licensing nuclear power plants).

The use of formal hearings for health and safety disputes has been demphasized because these controversies are dominated by questions of scientific and regulatory judgment.[73] These matters do not involve the typical adjudicatory fact questions because they are not capable of objective determination.[74] Informal rulemaking has been deemphasized because hybrid procedures are useful to resolve some types of scientific disputes. Some scientific disputes require a "general scientific judgment" which assesses the role and significance of scientific evidence in the regulatory process. For example, whether animal studies can be considered generally reliable to predict health effects in humans is a question requiring general scientific and regulatory judgments. These matters arguably are suitable for informal rulemaking because of their "legislative" nature.[75] Other disputes require "specific scientific judgment" which assesses the relevance of particular data. An example would be the determination of whether the methodology of a particular animal study is reliable.[76] Questions of "specific scientific judgment" are not legislative facts because they involve the application of expertise to the evaluation of particular and specific data.[77] The limited advocacy process of informal rulemaking has been considered inadequate to expose the evidentiary inferences that experts use in deriving specific scientific judgments.[78]

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[70] See, e.g., 33 U.S.C. § 1317(b)(1) (1982) (Clean Water Act); 42 U.S.C. § 7607(d) (1982)(Clear Air Act); 29 C.F.R. § 1911.15 (1984) (Occupational Health and Safety Act); 40 C.F.R. § 750 (1984) (Toxic Substances Control Act); see generally, Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal And Empirical Analysis, 42 U. CHI. L. REV. 401 (1975); Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Rulemaking, 60 CALIF. L. REV. 1276 (1972).

[71] See R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 7, at 6.4.9.

[72] See infra note 80.

[73] See Hamilton, supra note 63, at 1156 (discussion of FDA's Peanut Butter and Foods for Special Dietary Uses formal rulemaking proceedings); Harter, supra note 63, at 19-22 (discussion of disadvantages inherent in adversarial process); McGarity, supra note 33 at 732 ("[A]gencies have been forced to resolve scientific questions . . . partially on policy grounds . . . .[F]ormal procedures are generally inappropriate for resolving these issues . . . ."); see also Note, FDA Rulemaking Hearings: A Way Out of the Peanut Butter Quagmire, 40 GEO. WASH. L. REV. 726, 731-38 (1972) (discussion of disadvantages of trial-type hearings).

[74] See supra § 2B.

Although the use of hybrid rulemaking is a well developed trend, there is no consensus concerning what additional procedures should be used. Hybrid procedures vary particularly concerning the type of notice required[79] and the extent of cross-examination allowed.[80] The lack of consensus is most acute concerning the usefulness of cross-examination for health and safety matters.[81]

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[75] See McGarity, supra note 33, at 732, 736-43.

[76] See supra notes 40-41 and accompanying text.

[77] See McGarity, supra note 33, at 741-42 (discussion of "scientific judgment").

[78] See Hamilton, supra note 63, at 1155 (A justification for formal procedures is that it gives the objecting party an opportunity to point out that the agency's factual assumptions are erroneous.); see also Hagan, Remarks on the Regulatory Philosophy of FDA, 28 FOOD, DRUG, COSM. L.J. 195, 199-200 (1973)(Scientific factual disputes are best resolved in trial-type proceedings with cross-examination.); Hoffman, The FDA's New Forms of Public Hearing--Choosing Among the Alternatives, 32 FOOD, DRUG, COSM. L.J. 330, 333-35 (1977): but see Yellin, High Technology and the Courts: Nuclear Power and the Need for Institutional Reform, 94 HARV. L. REV. 489, 549 (1981) [hereinafter cited as High Technology] (An adversary process does not provide "a useful framework for improving the scientific underpinnings of administrative decisions."); Hutt, supra note 67, at 187-88 (Scientific and technical issues are not well-suited to trial-type procedures.).

D. Nature of Scientific Input

The use of the PBOI is in some respects consistent with the previous trends in two ways. First, use of the PBOI avoids the necessity to use a formal evidentiary hearing.[82] The movement away from the use of formal hearings reflects the belief that they are too cumbersome and relatively useless for the resolution of most types of scientific disputes.[83] Second, the PBOI is a "hybrid" proceeding which requires procedures beyond those that would be required for informal rulemaking under the APA.[84] The use of "hybrid" procedures reflects the belief that the procedures of informal rulemaking are insufficient to resolve issues of "specific" scientific judgment that are often found in scientific disputes.[85]

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[79] Most hybrid rulemaking schemes utilize the APA notice provisions, 5 U.S.C. § 553(b) (1982), but others require an expanded form of notice. See, e.g., 42 U.S.C. §7607(d)(3) (1982) (Clean Air Act).

[80] Compare Boyer, Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 41, 60 (1979) (use of cross-examination in hybrid FTC rulemaking) with Williams, supra note 70, at 434-35 (cross-examination used only as last resort at EPA Clean Air Act rulemakings); see Verkuil, The Emerging Concept of Administrative Procedure, 78 COL. L. REV. 258, 308-09 (1978) (comparison of how OSHA, EPA, and FTC control cross-examination).

[81] See Kestenbaum, Rulemaking Beyond APA: Criteria For Trial-Type Procedures and the FTC Improvement Act, 44 GEO. WASH. L. REV. 679, 702 (1976) (Cross-examination should be a procedure of last resort); Dixon, Rulemaking and The Myth of Cross-examination, 34 AD. L. REV. 389, 435-43 (1982) (Cross-examination is a necessary procedural safeguard.); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485, 522-23 (1970) (Cross-examination effectively exposes error and bias.); Anderson, An Overview of Recent Regulatory Developments--The Case for Evidentiary Hearings, 31 FOOD DRUG COSM. L.J. 159, 165 (1976) (The elimination of cross-examination will have a "generally negative effect on the factual integrity of any agency action."); Williams, supra note 70, at 436-55 (paper exchanges superior to cross-examination to expose faulty assumptions and methodologies); Boyer, supra note 80, at 63-64 (The FTC attempts to control cross-examination failed.); Hutt, Impact of Recent Court Decisions on the Future of FDA Regulations: An Impromptu Response to the Remarks of the Speakers, 28 FOOD DRUG COSM. L.J. 707, 714-15 (1973) (The key is not cross-examination, but full participation.).

The use of the PBOI, however, is also inconsistent in some ways with the previous trends. Recent developments continue the traditional reliance on advocacy procedures to evaluate specific scientific judgments.[86] The PBOI rejects that approach in favor of the use of a "scientific seminar" to resolve questions of specific scientific judgment. Decsisions are made by scientists, instead of an ALJ, and the use of adversarial procedures is greatly limited.[87] Because this aspect of the PBOI is unique,[88] this section considers the functions and methods of scientific input.

1. The Rationale For Scientific Input

The idea that scientists could help to resolve regulatory controversies originated with proposals for a "Science Court." The first of these, by Dr. Arthur Kantrowitz, proposed that a body composed of scientific experts be established to assist agencies in the resolution of the scientific aspects of regulatory issues.[89] Proponents of this concept argued that the scientists would be better qualified to understand complex scientific evidence, to distinguish between scientific and policy or value judgments, and to explain the resolution of disputes in a manner that would lend credibility for the decision reached.[90] Opponents argued that the idea was impractical because few regulatory controversies concerned disputes about purely scientific matters and because proponents proposed the use of adversarial procedures that were ill-suited to resolve scientific disputes.[91]

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[82] The PBOI proceeding is used in lieu of a formal evidentiary hearing. _See supra_ note 11 and accompanying text.

[83] _See supra_ notes 66, 67 and accompanying text.

[84] _Compare_ 5 U.S.C. § 553 (1982) (APA informal rulemaking) _with_ 21 C.F.R. §§ 13.1-.50 (1985) (PBOI procedures).

[85] _See supra_ notes 76-78 and accompanying text.

[86] _See supra_ notes 79-81 and accompanying text.

[87] _See supra_ notes 11-22 and accompanying text.

[88] _See infra_ notes 124-127 and accompanying text.

Although interest in the "Science Court" proposal waned, scholars continued to explore the possible uses of scientific expertise. In the 1970s, Judge Harold Leventhal suggested that courts ought to use scientific law clerks to assist in the decision of cases involving scientific and technological information.[92] Recently, Professor Yellin has proposed that a committee of scientists and other experts be available for appointment by appellate federal judges as special masters in cases where there are complex scientific issues.[93] As in the case of the PBOI, the special masters would assist the ultimate decision-maker, in this case an appellate court, by producing recommendations concerning the appropriate decision.[94] The PBOI serves the same function by producing an "initial decision" which is then reviewed by the Commissioner of FDA.[95]

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[89] Kantrowitz, *Proposal For An Institution For Scientific Judgment*, 156 SCIENCE 763, 763-64 (1967). For other proposals, see, *Comparative Risk Assessment: Hearings on H.R. 4939 Before the Subcomm. on Science, Research, and Technology of the House Committee on Science and Technology*, 96th Cong., 2d Sess. 279, 281 (1980) (American Industrial Health Council proposal for a science panel); B. ACKERMAN, S. ACKERMAN, J. SAWYER, & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 156 (1974) (proposal for a Technical Review Board); Ramo, *The Regulation of Technological Activities: A New Approach*, 67 ABA L.J. 1456, 1461-62 (1980)(proposal for a technological FBI); Bugliarello, *A Technological Magistrature*, BULL. ATOM. SCI., Jan. 1978, at 34 (Proposal for Technolgical Magistrature); Glick, *Reflections and speculations on the Regulation of Molecular Genetic Research*, 265 ANN. N.Y. ACAD. SCI. 178, 189 (1976). *See also* Kleinfeld, *A Court of Food and Drug Appeals*, 26 FOOD DRUG COSM. L.J. 279 (1971) (proposal for specialized federal court to hear appeals from FDA decisions).

[90] *See*, Sofaer, *Science Court: Unscientific and Unsound*, 9 ENVIRON. L. REV. 1, 4 (1978); Martin, *The Proposed "Science Court"*, 75 MICH. L. REV. 1058, 1059 (1977); Kantrowitz, *supra* note 89.

[91] *See* Sofaer, *supra* note 90, at 6-15; Talbott, *"Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"?*, 8 ENVIRON. L. REV. 827, 838 (1978), Weinberg, *"Science Court" Controversy: Are Our Courts and Agencies Adequate to Resolve New and Complex Scientific Issues*, 33 RECORD 8, 12 (1978); Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 827 (1977).

Professor Yellin argues that the use of scientists in this manner can overcome four difficulties in the present administrative process. First, it solves the problem that decision-makers in health and safety regulation cases must have sophistication in both the technological and legal aspects of the regulatory process.[96] Yellin argues that lawyers, who are trained to protect individual rights, rather than to produce scientific knowledge, are particularly ill-equipped to appreciate

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92. Leventhal, Environmental Decisionmaking and The Role of the Courts, 122 U. PA. L. REV. 509, 550 (1974); Leventhal, Remarks, 7 NAT. RESOURCES J. 351, 359 (1974).

93. Yellin, Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking, 92 YALE L.J. 1300, 1330 (1983) [hereinafter cited as Institutional Designs]; High Technology, supra note 78, at 555-60.

94. High Technology, supra note 78, at 555-57. The panel of special masters would be a presidentially-appointed and Senate-confirmed committee of scientists, engineers and lawyers capable of reviewing technical questions submitted by the appellate courts. It would report both its scientific findings and the potential societal and litigational implications concerning the matters referred to it. Id.

95. See 21 C.F.R §§ 12.32, 12.120 (1985).

96. High Technology, supra note 78, at 497, 553. Yellin notes that regulatory questions no longer consist merely of regulatory judgments; instead, "sophisticated quantitative methods for predicting the outcomes of social decisions" are now used to "analyze and shape the scientific and technological future." Institutional Designs, supra note 93, at 1300.

the nuances of scientific issues.[97] Second, it solves the problem that the legitimacy of the process requires that decision-makers issue clear and complete explanations for their decisions including the technologically complex aspects of those decisions. The use of scientists to make recommendations serves that goal by ensuring that there is a competent consideration of issues of scientific judgment.[98] The legitimacy of decisions will also be enhanced because the use of a scientific panel will involve members of the scientific community, with whom the panel can consult, and it will produce a decision that is tied to the scientific literature.[99] Third, it solves the problem that the adversarial system may not work competently when lawyers confront issues about which they lack sophisticated knowledge. The use of scientists assists the process by producing a scientific peer review process in which scientists can screen and evaluate the claims made by other scientists.[100] Finally, it solves the problem that the resolution of complex technological questions by the use of adversarial procedures is time-consuming and can cause delay.[101]

2. Models of Scientific Input

The ways in which health and safety agencies employ to obtain scientific input reflect aspects of the science court proposals. One model employs scientific generalists who may not be familiar with the immediate field of inquiry, but who are better able than laymen or lawyers, because of their background and training, to grasp the issues of scientific judgment that underlie many regulatory disputes. The other model employs recognized experts in the particular field of inquiry who bring to the process not only a relevant background and training, but also their own firsthand knowledge about the controversy.

Each of the models varies in two ways. First, agencies vary concerning the type of hearing procedure employed to obtain the scientific advice. Second, agencies vary concerning the status of the advice obtained. In some contexts, scientists are given the authority to make regulatory decisions, but in other contexts scientists act only as advisors. The following chart illustrates the spectrum of these various differences:

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[97] Institutional Designs, supra note 87, at 1312; High Technology, supra note 78, at 490, 492.

[98] Institutional Designs, supra note 93, at 1324.

[99] Institutional Designs, supra note 93, at 1326-27.

[100] Institutional Designs, supra note 87, at 1332; cf. High Technology, supra note 78, at 491, 513-14, 553.

[101] Institutional Designs, supra note 93, at 1326.

	Nature of Input			
	Advisory Committees	Expert Witness	Appointed Officials	Hearing Boards
Agency	FDA, EPA, OSHA, CPSC	FDA, NRC EPA	FDA NRC	FDA, VA NRC
General or specific expertise	general or specific	specific	general or specific	general or specific
Nature of hearing procedures	informal	formal	formal	Informal or formal
Advice or decision	advice	advice	decision	decision

The most popular method by which scientific input is obtained is the use of advisory committees. For example, agencies such as FDA,[102] EPA,[103] OSHA,[104] and CPSC[105] all use standing or ad hoc advisory commitees which submit advice concerning scientific and regulatory questions. The members are usually composed of scientific generalists or other persons affected by agency regulations.[106] The Advisory Committee Act requires agencies to follow certain procedures to hold advisory committee meetings.[107] Agency regulations impose additional procedures. For example, FDA requires advisory committees to hear presentations from parties affected by proposed agency actions.[108] FDA advisory committees are also required to issue written reports of their recommendations.[109]

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[102] The Center for Drugs uses a system of standing advisory committees to solict advice whether to approve new drug applications. Members of these committees are normally physicians with experience treating the type of disease for which the drug is intended. See supra notes 137-143 and accompanying text; see generally DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT: THE USE OF STANDING ADVISORY COMMITTEES BY THE BUREAU OF DRUGS OF FDA (1977) [cited hereinafter as USE OF STANDING ADVISORY COMMITTEES].

[103] See, e.g. 42 U.S.C. 4365 (1982) (Environmental Research, Development, and Demonstration Act of 1978). EPA has a standing Science Advisory Board (SAB) who meets periodically with the EPA admistrator to provide advice on the scientific and technical aspects of enviromental problems and issues. The membership is composed of "independent scientists and engineers of sufficient size and diversity to provide a range of expertise required to assess the scientific and technical aspects of environmental issues." Ashford, The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and the EPA, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 170 (J. Nyhart & M. Carrow, eds. 1983).

[104] OSHA has a mandatory, permenant advisory committee known as the National Advisory Committee on Occupational Safety and Health (NACCOSH) to advise the Secretaries of Labor and of Health and Human Services on general issues pertaining to the administration of the OSHA act. In addition, OSHA is authorized to create ad hoc advisory committees to consider specific subjects relating to the setting of occupational standards. Members of both types of committees include representatives from labor, industry, state regulators, and scientific experts. Ashford, supra note 103, at 169.

[105] See, e.g., 16 C.F.R. §1018 (1985). CPSC uses a Toxicology Advisory Board whose membership is composed of scientific experts including three members from the American Board of Medical Toxicology. Id.

[106] See supra notes 102-105.

Agencies also utilize institutional advisory committees such as the National Research Council of the National Academy of Sciences (NAS-NRC).[110] For example, FDA on four occasions in the 1960s asked the NAS-NRC for advice concerning whether it should ban saccharin, an artificial sweetener, on the basis that the additive was an animal carcinogen. Based on the advice it received, FDA decided against removing saccharin from the market until additional animal research was undertaken.[111]

Agencies also obtain advice from scientists who testify as expert witnesses in formal or hybrid hearings. For example, in FDA's formal hearing process, direct testimony of witnesses is submitted in advance in writing; the actual hearing process consists of the cross-examination of expert and other witnesses.[112] EPA, when it is engaged in hybrid rulemaking, also

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107. 5 U.S.C. App. (1982); *see* Tuerkheimer, *Veto By Neglect: The Federal Avisory Committee Act*, 25 AM. U.L. REV. 53 (1975); Perritt & Wilkinson, *Open Advisory Committees and the POlitical Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725 (1975).

108. USE OF STANDING ADVISORY COMMITTEES, *supra* note 102, at 94-103.

109. *Id*. at 109-113; *see supra* note 146 and accompanying text.

110. *See* Grobstein, *The Role of the National Academy of Science in Public Policy and Regulatory Decision-Making*, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 115 (J. Nyhart & M. Carrow eds. 1983).

111. *Id* at 130-132.

112. 21 C.F.R. §12.87(b). The Nuclear Regulatory Commission also uses a formal hearing process. *See* 10 C.F.R. §§2.700-2.790 (1985).

has the opportunity to receive expert advice in this fashion.[113]

Agencies also use scientists as decision-makers. At some agencies, politically appointed officials are chosen because of their general scientific backgrounds. Recent Commissioners of FDA have been physicians or scientists.[114] Similarly, the membership of the Nuclear Regulatory Commission (NRC) often includes physicists and engineers.[115] At both agencies, these officials are responsible for making the final licensing decisions as part of a formal hearing process that includes an initial decision or decisions by an ALJ or by hearing boards.[116]

Finally, agencies appoint scientists to hearing boards of various types. The NRC uses either an Atomic Safety and Licensing Board or an Administrative Law Judge to conduct the initial hearing concerning the licensing of nuclear power plants.[117] One member of the board is a lawyer and the two others are scientists or engineers who have "such technical or other qualifications as the Commission . . . deems appropriate to the issues to be decided . . . ."[118] The hearing process is formal adjudication.[119] Decisions by an ALJ or a Board are reviewed by the Atomic Safety and Licensing Appeal Board.[120] Membership of the appeals board, which can include scientists or engineers, is drawn from the Atomic Safety and Licensing Appeal Panel and is chosen based on "qualifications deemed appropriate to the issues to be decided . . . ."[121]

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[113] 33 U.S.C. § 1317(b)(1) (1982) (Clean Water Act); 42 U.S.C. § 7607(b) (1982) (Clean Air Act).

[114] Recent FDA Commisioners are Frank Young, M.D., Arthur Hayes, Jr. M.D., Jere Goyan, Ph.D., Donald Kennedy, Ph.D., and Alexander Schmidt, M.D. WHO'S WHO IN AMERICA (1984).

[115] *See* D. FORD, THE CULT OF THE ATOM: THE SECRET PAPERS OF THE ATOMIC ENERGY COMMISSION 213 (1982).

[116] At the FDA, the Commissioner reviews an initial decision by an Administrative Law Judge (ALJ) who recommends whether a new drug or food additive should be licensed. *See* 21 C.F.R. § 12.125 (1985). At the NRC, the Commission can review the decisions of the Atomic Safey and Licensing Appeal Board. 21 C.F.R. § 2.786 (1985).

[117] 10 C.F.R. §2.721 (1985).

[118] *Id.*

[119] *Id.* at 2.700-.700a.

The Veterans Administration also uses an appeals board whose membership includes scientists. The Board of Veterans Appeals hears appeals from initial disability determinations in panels of three members, one of whom is usually a physician.[122] Unlike the NRC, however, there is no requirement that the physician be a specialist in the disease or injury involved in the appeal.[123]

The PBOI and the other hearing procedures that FDA offers as an alternative to a formal hearing also involve scientists,[124] but they differ from other agencies in three significant ways. First, unlike the Atomic Safety and Licensing Board, the hearing is not conducted according to the APA procedures for adjudication.[125] Second, unlike the boards at both the NRC and VA, the hearing panels consist only of scientists.[126] Third, unlike the usual situation at the NRC and VA procedures, the scientists, with the exception of the Commissioner, are not employees of the agency.[127]

When FDA designed the PBOI, the agency was aware that it was creating a procedure that differed in important ways from the other methods by which scientific input is obtained. The next section explains the basis on which these decisions were made.

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[120] Id. at §2.785.

[121] Id. at §2.787.

[122] S. BLOCK, FEDERAL DISABILITY LAW AND PRACTICE §6.7 (1984).

[123] Id.

[124] See supra note 13 and accompanying text.

[125] See supra notes 18-20 and accompanying text.

[126] See supra note 13 and accompanying text.

[127] See supra notes 13-15 and accompanying text.

3. The Rationale For The PBOI

FDA's rationale for the PBOI was similar to the arguments made on behalf of a science court. Unlike the proponents of the original science court proposal, however, FDA distrusted the use of advocacy procedures for scientific and regulatory disputes. This distrust had two sources. FDA had a disastrous experience with formal rulemaking hearings in the 1960s. By comparison, FDA had a productive experience with its advisory committee system in about the same period. The PBOI process was intended to emulate that system.

At the time it was proposed, FDA justified the PBOI on the ground that "in those situations where complex scientific and medical issues are involved, a searching scientific inquiry conducted by independent experts may well be more appropriate to resolve the matters involved than a formal evidentiary hearing."[128] In support of this conclusion, FDA stated that "[t]here had been substantial concern expressed in recent years about the need for development of more appropriate procedures than [a] trial-type hearing for resolving difficult scientific issues."[129] The agency thought that its version of a science court would be responsive to these concerns because it combined "the features of traditional scientific inquiry with the need of the law to develop a full record on which to base the Commissioner's decision and subsequent judicial review."[130]

FDA interest in using a scientific type of inquiry was based in part on a desire "to avoid inappropriate use or abuse of formal trial-type hearings."[131] The Commissioner explained that FDA's experience with formal hearings in the 1960s had been the subject of "virtually unanimous criticism" on the ground that they were a hopelessly inefficient method to litigate the type of issues the agency usually considered.[132] In one of those rulemaking proceedings, the agency took over eleven years to determine what percentage of peanuts was required before a product could be labeled as "peanut butter.[133] The Commissioner noted that the PBOI incorporated some of the suggestions for reform that had been made by critics of formal hearings.[134]

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[128] Administrative Practices and Procedures: Notice of Proposed Rulemaking, 40 Fed. Reg. 40,682, 40,699 (1975).

[129] Id. at 40,699.

[130] Id.

[131] Id.

FDA's interest in the scientific type of inquiry was also based on a belief that advocacy procedures, even if properly utilized, were inappropriate for scientific disputes. The preamble to the proposed PBOI quoted Professor Gellhorn's observation that "some of this country's gravest administrative deficiencies stem from lawyer-introduced overreliance on courtroom methods to cope with problems."[135] FDA believed the "scientific seminar" model of decision-making followed in its advisory committees was more appropriate.[136]

Since the early 1960s, FDA has used panels of independent scientists to advise the agency on specific scientific issues.[137] The Center for Drugs and Biologics, for example, has a formal system of eighteen standing advisory committees to which it refers questions concerning the safety and efficacy of new drugs.[138] In addition, the Commissioner is authorized to create "color additive advisory committees" for questions concerning the safety of color additives.[139] Members of advisory committees, who are chosen by the Commissioner from nominations by interested persons and groups, are either voting or nonvoting members.[140] To be eligible, voting members are required to "have expertise in the subject matter with which the committee is concerned and have diverse professional education, training, and experience so that [a] committee will reflect a balanced composition of sufficient scientific expertise to handle the problems that come before it."[141] To be eligible, voting members must also pass FDA's conflict of interest regulations.[142] Nonvoting members are chosen "to represent and serve as a liason with interested individuals and organizations" such as consumer and other interest groups.[143]

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[132] Id. at 40,698.

[133] See Hamilton, supra note 63, at 1143-50; Peanut Butter Quagmire, supra note 73, at 732-38.

[134] 40 Fed. Reg. 40,699 (1975).

[135] Id. at 40,698 quoting Gellhorn, Administrative Procedure Reform: Hardy Perennial, 48 ABA J. 243, 243 (1962).

[136] Telephone interview of Peter Hutt (former FDA General Counsel) (July 1, 1985).

[137] THE USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 7-8.

[138] See 21 C.F.R. §§14.100, 14.171 (1985). The Center for Devices and Rediological Health has sixteen standing advisory committees. Id.

Advisory committee meetings are generally divided into three portions: presentation, discussion, and deliberation. Various categories of people will present information. If a new drug is under consideration, for example, those presenting information include representatives from the pharmaceutical company that is seeking approval for the drug, from the FDA scientific staff, and occasionaly, from public interest organizations.[144] The nature of the deliberation process varies from committee to committee, but decisions are usually made by consensus.[145] FDA regulations require advisory committee decisions to be in writing, but the required report "may consist of the approved minutes of the meeting or a separate written report." In either form, the report is required to respond "to the specific issues or questions which the Commissioner has addressed to the advisory committee" and to state "the basis of the advice and recommendations of the committee."[146]

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[139] Id. at 14.140.

[140] Id. at §14.8.

[141] Id. at §14.80(b)(1).

[142] Id. at §14.80(a)(2).

[142] Id. at §14.84(a).

[144] THE USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 94.

[145] Id. at 103. In cases of disagreement, there will be a formal vote. Id.

A government study of FDA's advisory committee system reported:

> Experts provide valuable advice on complex technical issues and assist the agency in deciding critical questions of scientific judgment. . . . [A]dvisory committees [also] offer FDA a dialogue with the nation's foremost experts in drug therapy. The committees are thus an important source of peer review for proposed FDA decisions. For these reasons, use of advisory committees increases public and industry acceptance of FDA decisions and improves the credibility of the agency.[147]

FDA hoped that the same advantages concerning accuracy and legitimacy might result from the use of the PBOI. FDA also thought, however, that the PBOI would have three important advantages over the traditional use of an advisory committee. First, the PBOI process would subject FDA licensing decisions to review by an independent panel of outside experts. FDA regulations provide that a party may be entitled to a hearing, such as a PBOI, to contest an agency decision whether to license a new drug or food additive.[148] As a result, FDA believed that the PBOI would augment the agency's use of advisory committees which occurs before FDA reaches a decision whether to license a product.[149] FDA anticipated that the accuracy and legitimacy of their decisions would thereby be enhanced.[150] Second, the PBOI, because of its format as a hearing body, would involve a more intense scrutiny of FDA's decision than normally occurs in advisory committee meetings.[151] Finally, the PBOI format would encourage greater public participation than the advisory committee format allowed. This "open" aspect of the PBOI was intended to increase the agency's accountability to interested parties, to enhance FDA's general image with the public, and to increase the agency's reputation for fostering the use of scientific expertise.[152]

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[146] 21 C.F.R. at §14.174.

[147] DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, FINAL REPORT 52 (1977) [hereinafter cited as Final Report].

[148] See supra notes 6-9 and accompanying text.

[149] See infra note 384 and accompanying text.

[150] Interview with Katherine Copp and Fletcher Campbell, Counsel for the Center for Drugs and Biologics, Depo-Provera Hearing, in Washington, D.C. (June 27, 1985); see infra notes 391-403 and accompanying text.

Besides the previous advantages, FDA hoped the PBOI had one other advantage. One function of advisory committees is to develop a consensus among scientists concerning the resolution of difficult issues of scientific judgment.[153] The agency hoped that the PBOI might serve this function as well.[154]

It is apparent that FDA had "high hopes" for the PBOI. The agency anticipated it would be more efficient, more accurate, and more legitimate than a formal hearing. It would be more efficient because it would be largely nonadversarial. It would be more accurate because the Board was composed of expert scientists. Finally, it would be more legitimate because the PBOI was both a more open process and a process more likely to develop a consensus position for difficult scientific issues.

III. EVALUATION OF THE PBOI

The PBOI is both a product of recent administrative law trends and a departure from them. As a hybrid procedure, it reflects the movement away from the use of both formal hearings and informal rulemaking to resolve scientific disputes.[155] At the same time, it embraces the science court concept of using scientific experts to make decisions concerning scientific disputes. Unlike the original proposal for a science court, however, it rejects the use of most types of adversarial procedures for that purpose.[156]

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[151] See infra notes 384-389 and accompanying text.

[152] Interview with Jeff Stribling, Counsel for Depo-Provera PBOI, in Washington, D.C. (June 25, 1985); Copp and Campbell interviews, supra note 150.

[153] Hutt interview, supra note 136; cf. USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 103 (most advisory committee decisions are by "consensus.").

[154] Id.

[155] See supra notes 82-85 and accompanying text.

FDA justified the PBOI on the simple proposition that scientists can improve the efficiency, quality and legitimacy of decisions that involve important issues of scientific judgment.[157] As a result, the PBOI offers the opportunity to evaluate whether this idea is a useful one. This section offers such an evaluation.

A. The "Aspartame" Case

Aspartame, which is sold under the brand name of Nutrasweet, is a popular food additive commonly used as a sugar substitute in diet soft drinks and other products.[158] FDA's decision in 1981 to approve Aspartame ended years of controversy surrounding saccharin, another sugar substitute, the use of which Aspartame has almost completely replaced. FDA had attempted to ban the use of saccharin on the ground it was an animal carcinogen, but Congress overruled the agency and instead required a consumer label that warned of that possibility.[159] Prior to those events, FDA had banned the sale of cyclamates also on the ground that cyclamates were carcinogenic in animals.[160] As a result, there was considerable public interest in whether Aspartame presented similar problems. This public interest was heightened by two events. One was the discovery that the Searle Company, which owned Aspartame, had hired a firm to do animal research that had submitted fraudulent data to FDA for other companies.[161] The other was that a prominent public interest advocate, James Turner, had challenged FDA's anouncement that it intended to approve Aspartame.[162] The following section describes the Aspartame PBOI hearing and why FDA decided to approve that additive.

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[156] See supra notes 128-136 and accompanying text.

[157] See supra § 2D3.

[158] See infra note 229 and accompanying text.

[159] See Cooper, supra note 34, at 43-65.

[160] 34 Fed. Reg. 17.063 (1969); see also 35 Fed. Reg. 13,644 (1970).

[161] See infra notes 184-185 and accompanying text.

1. Statutory Standards

FDA is required under the original Food, Drug, and Cosmetic Act (FDCA) to determine that a food additive[163] is "safe" before it can be added to food.[164] In addition, Congress amended the FDCA, by the "Delaney Amendment," to prohibit the approval of any food additive that causes cancer in animals.[165] The manufacturer of an additive has the burden of proving the additive's safety.[166]

To obtain approval, a manufacturer files "a petition proposing the issuance of a regulation prescribing the terms and conditions under which such additive may be safely used."[167] FDA must hold a hearing concerning this request under two circumstances. If FDA denies the petition, the manufacturer can request a hearing to consider its objections to the agency's action.[168] If FDA intends to approve the petition, it must propose a regulation prescribing the terms and conditions under which the additive can be used.[169] Any person "adversely affected" by the proposed rule can also request a hearing to consider its objections.[170] In both these situations, FDA is obligated to provide the requested hearing if the person seeking a hearing raises an issue of material fact.[171]

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[162] See infra note 178 and accompanying text.

[163] "The term 'food additive' means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food . . . ." 21 U.S.C. § 321(s) (1982).

[164] 21 U.S.C. § 348(c)(3) (1982); 21 C.F.R. § 170.3(i) (1984)(FDA's definition of safety).

[165] 21 U.S.C. § 348(c)(3)(A) (1982); see also, id. at § 360(d)(1)(H) (Delaney clause for color additives); id. at § 376(b)(5)(B) (Delaney clause for animal drugs). The other safety considerations taken into account by FDA include the additive's probable consumption, substances formed in the food by the additive, cumulative effects of the additive in man's diet, and other scientifically-recognized safety factors. Id. at § 348(c)(5).

[166] 21 C.F.R. § 12.87(d) (1985).

[167] 21 U.S.C. § 348(b) (1982).

Any person entitled to a hearing has four options: FDA interprets the FDCA to require a "formal evidentiary public hearing,"[172] but a party is entitled to waive that right and participate instead in a hearing before a PBOI,[173] an advisory committee,[174] or the Commissioner of FDA.[175]

2. Pre-Hearing Process

In March, 1973, G. D. Searle & Co. petitioned the FDA to approve the use of Aspartame in foods.[176] After FDA issued the requested regulation in July 1974,[177] two requests for a hearing were received.[178] As a result, FDA stayed its regulation approving the use of Aspartame.[179]

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[168] Id. at § 348(f)(1).

[169] Id. at § 348(c)(1).

[170] Id. at § 348(f).

[171] 21 C.F.R. § 12.93 (1985) (FDA's summary judgment regulation).

[172] See id. at §§ 12.1-.159.

[173] See id. at §§ 13.1-.50.

[174] See id. at §§ 14.1-.174.

[175] See id. at §§ 15.1-.45.

[176] 38 Fed. Reg. 5921 (1973).

[177] 39 Fed. Reg. 27,317 (1974); correction notice, 39 Fed. Reg. 34,520 (1974); codified at 21 C.F.R. § 172.804 (1974).

The two parties raising questions about Aspartame's safety were Dr. John Olney, a Professor of Psychiatry at Washington University School of Medicine, St. Louis, and Mr. James S. Turner, a lawyer who represented himself and a consumer group called LABEL (Legal Action for Buyer's Education and Labeling). Both waived their right to a formal evidentiary hearing and requested that the FDA convene a Public Board of Inquiry.[180] The FDA granted that request,[181] and granted the request of six interested persons to make oral presentations as nonparty participants at the hearing.[182] The Board also hired two consultants to advise it.[183]

Because there was a possibility that certain of Searle's animal data were fraudulent, the agency postponed convening the Board until those questions could be resolved.[184] The data in question were reviewed by the Universities Associated for Research and Education in Pathology (UAREP). FDA received the

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[178] See 40 Fed. Reg. 56,907 (1975); 46 Fed. Reg. 38,285 (1981) [hereinafter cited as Commissioner's Final Decision].

[179] 40 Fed. Reg. 56,907 (1975).

[180] Id.

[181] 44 Fed. Reg. 31,716 (1979).

[182] 45 Fed. Reg. 2908 (1980). The six presenters were: (1) The Bureau of Foods, FDA, (2) John W. Olney, M.D., (3) James S. Turner, (4) G.D. Searle and Company, (5) Lloyd J. Filer, Jr., M.D., and (6) Richard J. Wurtman, M.D. Id.

[183] The consultants were William Nyhan, M.D. and Milton Brightman, M.D. 46 Fed. Reg. 38,286 n.2 (1981).

[184] 45 Fed. Reg. 2908 (1980).

UAREP report on December 13, 1978 and agreed with its conclusion that the Searle data were authentic.[185]

In preparation for the PBOI FDA negotiated with Dr. Olney and Mr. Turner concerning the scope of the issues to be decided by the Board. The charges submitted to the Board were: (1) whether the ingestion of Aspartame, alone or in conjunction with glutamate, poses a risk in humans of mental retardation or other brain related injuries; (2) whether the ingestion of Aspartame may induce brain tumors in rats; and (3) whether Aspartame should be allowed for use in foods in light of the answers to the previous questions.[186]

In preparation for the hearing, Dr. Olney, Searle, and FDA's Center for Food Additives all submitted nominees for Board members.[187] FDA regulations provide that the Commissioner chooses one member from the nominees submitted by the Bureau of Foods and the petitioner, one from the other parties' nominees, and one from any source, who will serve as Chairperson.[188] The three persons chosen were Dr. Walle Hauta, who served as chairperson, of the Department of Psychology, Massachusetts Institute Of Technology; Dr. Peter J. Lampert, Chairperson of the Department of Pathology, University of California (San Diego); and Dr. Vernon Young, Department of Nutrition and Food Science, Massachusetts Institute of Technology.[189]

3. Hearing Process

In July 1979, FDA announced the PBOI hearing,[190] which was held in January of 1980. The process, which took three days, was organized into three sets of presentations by Dr. Olney, the

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[185] 44 Fed. Reg. 31,717 (1979).

[186] See Commissioners Final Decision, supra note 178, at 38,285-286.

[187] Id. at 38,266.

[188] See supra note 13.

[189] Commissioners Final Decision, supra note 178, at 38,266.

[190] 44 Fed. Reg. 31,716 (1979).

Bureau of Foods, and Searle.[191] Each set of presentations addressed one of the three charges given to the Board by the Commissioner. The presentations were similar to those given at scientific meetings, including the use of slides to illustrate the information being discussed.[192] The presentations were often interrupted or followed by questions from the Board members who sought a clarification of the information being presented.[193] The other persons present, however, were not allowed to interrupt the presentations, which is prohibited by the PBOI procedures.[194]

Following the presentations, the parties, the nonparty participants, and the Board's consultants were allowed to make comments or to ask questions directly of a witness or of each other.[195] Several times during these question periods the proceeding turned into a roundtable discussion during which several of those present questioned or debated each other.[196] These interchanges were almost always nonconfrontational and nonadversarial in nature.[197] Lawyers did not participate in the hearing in any function with the exception of occasional comments by Mr. Turner who was one of the parties.[198]

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[191] See Commissioners Final Decision, supra note 130, at 38,286. See, e.g., [In the matter of] Aspartame, No. 75-F-0355, Hearing Record 5 (December 30, 1980) (Presentation of Neil Singletary, M.D., Bureau of Foods) [cited hereinafter as Aspartame Record]; id. at 25 (Presentation of John Olney, M.D., party); id. at 86 (Presentation of Louis Stegink, M.D., Searle consultant).

[192] See, e.g., Aspartame Record, supra note 191, at 87 (Presentation of Louis Stegink, M.D., Searle consultant).

[193] See, e.g., Aspartame Record, supra note 191, at 130-33 (Questions by Board members during presentation of Louis Stegink, M.D., Searle consultant).

[194] See supra notes 18-19 and accompanying text.

[195] See, e.g., Aspartame Record, supra note 191, at 197 (Comments of Richard Wurtman, M.D., nonparty participant).

[196] See, e.g., Aspartame Record, supra note 191, at 223-247.

[197] Interview with Robert Becker and Peter Safir, Counsel for Searle, Aspartame Hearing, in Washington, D.C. (June 24, 1985).

4. Post-Hearing Process

The board issued its decision October 1, 1980 and recommended that FDA revoke approval of Aspartame until additional safety testing could be done. The Board concluded that Aspartame did not poase a risk of mental retardation or other brain injury, but it also concluded that there was insuficient evidence to determine that Aspartame did not induce tumors in rats.[199] On July 24, 1981, the FDA Commissioner issued his final decision, which favored the approval of Aspartame.[200] Consequently, the FDA reinstated the Aspartame regulation.[201]

The Commissioner affirmed the Board's finding that Aspartame did not pose a risk of brain injuries.[202] The first charge arose from the fact that Aspartame is composed of two amino acids, phenylalanine (PHE) and aspartic acid (ASP), both of which previous studies had shown could be dangerous.[203] Prolonged concentrations of PHE in a person's blood plasma can cause brain damage,[204] and a one-time concentration (or surge) of ASP can cause nerve cell damage (focal brain lesions) and neuroendocrine dysfunctions.[205]

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[198] *See, e.g.*, Aspartame Record, *supra* note 191, at 234-236.

[199] In the Matter of Aspartame, Initial Decision of Public Board of Inquiry 49 (1980) [hereinafter cited as Aspartame PBOI Decision]; *see also*, [1980 New Matters] FOOD DRUG COSM. L. REP. (CCH) [In the matter of] Aspartame ¶ 38,072, 38,349 (1980) (excerpted version of PBOI decision).

[200] Commissioner's Final Decision, *supra* note 178, at 38,285.

[201] 46 Fed. Reg. 50,947 (1981).

[202] Commissioner's Final Decision, *supra* note 178, at 38,285.

[203] *See* Aspartame PBOI Decision, *supra* note 199, at 10; Commissioner's Final Decision, *supra* note 178, at 38,287-294.

[204] *See* Aspartame PBOI Decision, *supra* note 199, at 10; *see also* Commissioner's Final Decision, *supra* note 178, at 38,290.

To resolve whether Aspartame could have these effects, the PBOI had to engage in a two-part inquiry. First, the board had to evaluate published studies to determine the toxic threshold for PHE and ASP. The toxic threshold is the lowest amount of a substance that poses a risk of injury.[206] Second, the Board had to determine whether, based on other studies, the use of Aspartame would cause individuals to consume more than the toxic threshold amount of PHE or ASP.[207] The Board and the Commissioner concluded that the use of Aspartame would not pose a risk that PHE[208] or ASP[209] would be absorbed above their toxic thresholds.

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[205] See Aspartame PBOI Decision, supra note 199, at 22; see also Commissioner's Final Decision, supra note 178, at 38,291.

[206] See Aspartame PBOI Decision, supra note 199, at 11.

[207] Id.

[208] For PHE, the Board evaluated studies in which normal adults, pregnant women, one year old children, and PKU children consumed large amounts of Aspartame. PKU (phenylketonuria) is an inhereted disorder in which the body can not rid itself of PHE. The accumulated PHE can cause severe mental retardation. Aspartame PBOI Decision, supra note 199, at 11-12. The board examined how the ingestion of Aspartame affected the PHE levels in these test subjects. Based on the results, the Board concluded that individuals could not consume enough Aspartame to raise their PHE levels to the toxic threshhold. Id. at 13-21.

[209] For ASP, the Board established a toxic threshhold by using data from the most sensitive species tested and from the most sensitive age of that species. Aspartame PBOI Decision, supra note 199, at 22-23, 36. This choice was based on the fact that nerve cell damage can occur from only one surge of a toxic ASP concentration. Id. at 22, 36. Based on previous studies concerning consumption of glutamic acid (GLU), which is metabolized exactly like ASP, the Board concluded that the biological mechanisms which protect humans from GLU and ASP surges would not be overcome by the use of Aspartame. The Board noted that this conclusion was true even in light of its choice of a toxic threshhold that was very sensitive. Id. at 38. The Commissioner affirmed these conclusions with minor exceptions. Commissioner's Final Decision, supra note 178, at 38,292, 38,294.

The Board and the Commissioner rejected arguments by Dr. Olney that PHE was dangerous to certain children and fetuses on the regulatory, or policy, ground that Aspartame posed no greater risk of harm to these persons than the consumption of protein found in many products on the market.[210] Both also rejected Dr. Olney's arguments concerning ASP that the Board had misevaluated the evidence by disregarding relevant studies and overemphasizing irrelevant studies.[211]

Unlike the previous issue, the Commissioner and the Board disagreed concerning the Board's interpretation of the rat studies conducted by Searle.[212] This charge arose from the fact that some test animals fed Aspartame had developed brain tumors. The Board had to decide whether these experiments had "biological significance," or whether a causal relationship existed between the development of the tumors and the fact the test animals had been fed Aspartame.[213] The Board found that some aspects of one of the three available studies indicated a causal relationship, but that problems with a second of the studies prevented any firm conclusions about its validity.[214] The Commissioner concluded that the evidence cited by the Board in support of its conclusion was based on calculation[215] and evaluation errors.[216] As a result, the Commissioner concluded that test group of rats did not have a statistically significant higher incidence of tumors than those in the control group.[217]

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[210] See Letter from John W. Olney, M.D., to FDA Commissioner Goyan, at 1 (December 19, 1980) (Exceptions to PBOI Decision on Aspartame) [hereinafter cited as Olney Exceptions]; Aspartame PBOI Decision, supra note 199, at 20-22; Commissioner's Final Decision, supra note 178 at 38,291. For a description of the dangers of PHE, see supra, note 208.

[211] See Olney Exceptions, supra note 210, at 2-6; Commissioner's Final Decision, supra note 178, at 38,293.

[212] Id. at 38,303.

[213] See supra notes 38-39 and accompanying text.

[214] Aspartame PBOI Decision, supra note 199, at 46-47. The Board found that one study was troubling because there was a high rate of death in young test rats and a possible dose-effect relationship. Id. at 47. The Board found that a second study was "puzzling" because it used an insufficient number of experimental animals and "bizarre" because the control group had a higher incidence of brain tumors than the Board thought was normal. Id; see infra notes 218-219 and accompanying text.

One significant difference between the Commissioner and the Board concerned a matter of scientific judgment. The Board concluded that one animal study was invalid because the incidence of tumors in the control group of rats was higher than normal for spontaneous tumors in that type of animal.[218] The Commissioner disagreed. He found that the incidence of tumors in the control group was consistent with the incidence rate of spontaneous tumors indicated by the literature.[219]

The Commissioner also overruled the Board on the third issue of whether Aspartame should be licensed. The Board had taken the position that because there was evidence that Aspartame might cause brain tumors, additional testing was required before the safety of the product could be determined.[220] The Commissioner concluded that the Searle data did not suggest that Aspartame caused brain tumors and therefore the product could be marketed.[221] The Commissioner also refused to call a new hearing concerning a fourth issue raised on appeal, whether or not the Searle data were authentic.[222]

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[215] The Commissioner held that the Board's conclusions that causality existed in one study was erroneous because the Board had made a factual error in calculating the age at which some young rats that had died. Commissioner's Final Decision, supra note 178, at 38,300. He also found that the Board had made a statistical error in calculating a possible dose-response relationship by improperly adding the results of two studies. Id. at 38,299.

[216] The Commissioner found that the Board's conclusion that one study was unreliable was in error because Searle had used a sufficient number of test animals, id. at 38,300, and because the Board was mistaken concerning the normal incidence of tumors for a control group. See infra notes 218-220 and accompanying text.

[217] Commissioner's Final Decision, supra note 178, at 38,301.

[218] Aspartame PBOI Decision, supra note 199, at 42-47; see also, Commissioner's Final Decision, supra note 178, at 38,295.

[219] Commissioner's Final Decision, supra note 178, at 38,295.

[220] Aspartame PBOI Decision, supra note 199, at 49.

One year later, Searle petitioned the FDA to amend the food additive regulation to provide for the use of Aspartame in carbonated beverages.[223] FDA amended the regulation as requested.[224] Although objections were filed by several parties,[225] the FDA initially denied their request for a a stay[226] and ultimately denied their request for a hearing.[227]

FDA's decision to license Aspartame for use in carbonated beverages was affirmed in Community Nutrition Institute v. Novitch.[228] The court determined that FDA had properly rejected the objections to its approval of Aspartame for use in carbonated beverages on the basis of the tests and studies the agency had evaluated in its approval of Aspartame for use in foods. The court concluded therefore that those who objected to the use of Aspartame in beverages had not raised any material issue that required FDA to hold a hearing for the resolution of that issue. Since its approval, aspartame has been added to a wide variety of foods and has generally replaced saccharin as the preferred artificial sweetener.[229]

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[221] Commissioner's Final Decision, supra note 178, at 38,301, 38,303.

[222] Prior to the time the PBOI was convened, FDA investigated the possibility that the Searle data might be fraudulent, but the agency upheld the data's validity after the results were independently verified. See supra notes 184-185 and accompanying text. Mr. Turner argued that the Board had to determine the authenticity of the studies because that issue had a direct bearing on any determination of safety. See Exceptions for Turner, at 1-3 [In the matter of] Aspartame, No. 75-F-0355 (Dec. 17, 1980) [hereinafter cited as Turner Exceptions]. The Commissioner affirmed the PBOI's determination that the issue was outside the scope of the hearing because it was not one of the charges originally made to the PBOI by the Commissioner. Commissioner's Final Decision, supra note 178, at 38,301.

[223] 47 Fed. Reg. 46,140 (1982).

[224] 48 Fed. Reg. 31,376 (1983).

[225] 48 Fed. Reg. 31,376 (1983).

[226] 48 Fed. Reg. at 42,899.

[227] 49 Fed. Reg. 6672 (1984) (also contains a complete publication of final rule).

[228] 773 F.2d 1356 (D.C. Cir. 1985).

B. The Depo-Provera Case

Depo-Provera is approved for use as an injectable contraceptive in over ninety countries. It has been licensed in almost all of the countries in which approval has been sought with the major exception being the United States.[230] Attempts by the Upjohn Company to gain regulatory approval in the United States span over twenty-five years.[231] The PBOI which FDA convened to consider its approval recommended to the agency that it not license the drug. To date, the Commissioner has not acted on this recommendation. By comparison, a panel of scientific experts in Great Britain recently recommended that the drug be approved and in 1984 the British licensing authority agreed.[232]

FDA's actions concerning Depo-Provera has been of considerable public interest.[233] The PBOI proceeding, for example, attracted the participation of forty-four individuals and organizations including representatives from the National Cancer Institute, the National World Health Network, the World

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[229] *See, e.g.*, N.Y. Times, Feb. 5, 1985, at 19, col. 1; N.Y. Times, Sep. 20, 1983, at 330, col. 5; N.Y. Times, Sep. 3, 1983, at 21, col. 3; N.Y. Times, Oct. 24, 1982, at F4, col. 3.

[230] Richard and Lasagna, *Depo-Provera: Comparsion of the U.K. ands U.S. Advisory Board Recommendations* (August 20, 1985) (unpublished paper).

[231] *See infra* notes 244-258 and accompanying text.

[232] Richard and Lasagna, *supra* note 230.

[233] *See* Rosenfield, Maine, Rochat, Shelton & Hatcher, *The Food and Drug Administration and Medroxyprogesterone: What Are the Issues?*, 249 JAMA 2922 (1983).

Health Organization, and the Agency for International Development.[234]

1. Statutory Standards

Before a new drug may be shipped in interstate commerce, its safety and effectiveness must be established by scientific experimentation.[235] Proof consists of first animal and then human experimentation.[236] The applicant submits the animal testing information, as well as other information, to the FDA in the form of a Claimed Investigational Exemption for a New Drug (IND) and may ship the drug interstate for human testing if FDA does not object within 30 days.[237] The human data is submitted to the FDA in the form of a New Drug Application (NDA).[238] If the NDA is approved, the manufacturer may market the new drug.[239]

If an NDA is not approved, the FDA must offer the sponsor an opportunity for a formal hearing,[240] after which the agency issues a final order either to approve or disapprove the

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[234] See infra notes 252-53 and accompanying text.

[235] 21 U.S.C. § 355(b) (1982). To establish "effectiveness," the manufacturer must have at least two well-controlled clinical studies that indicate the drug has the therapeutic advantages claimed for it. Id. at 355(d); see Limiting Physician Freedom, supra note 29, at 803.

[236] 21 C.F.R. §§ 310-314 (1984).

[237] 21 C.F.R. § 312.1(a) (1984).

[238] Id. at § 314.1.

[239] 21 U.S.C. § 355(c)(1) (1982).

[240] Id. at § 355(c)(2).

NDA.[241] Alternatively, a sponsor may request a hearing before a PBOI, an advisory committee or the Commissioner.[242]

2. Pre-hearing Process

In 1960, FDA approved Depo-Provera[243] for the treatment of two problems associated with pregnancy.[244] In 1963, Upjohn submitted an IND to initiate clinical studies to determine Depo-Provera's safety and efficacy as a contraceptive.[245] In 1967, Upjohn submitted a NDA for the use of Depo-Provera as a contraceptive through intramuscular injection.[246] FDA approved the NDA in 1974.[247]

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[241] Id. at § 355(d). Grounds for denying approval include inadequate safety tests, inconclusive test results, test results indicating the drug is unsafe, and lack of substantial evidence that the drug is effective. See Limiting Physician Freedom, supra note 29, at 803.

[242] 21 C.F.R. § 314.201 (1984); see supra notes 8-10 and accompanying text.

[243] Depo Medroxyprogesterone Acetate or DMPA.

[244] These were for endometriosis, which is the presence of endometrial tissue outside the uterus, and for habitual or threatened, spontaneous abortions. J. Weisz, G. Ross, and P. Stolley, Report of the Public Board of Inquiry on Depo-Provera 8 (October 17, 1984) (unpublished report) [hereinafter cited as PBOI Report]; see FOOD DRUG COSM. L. REP. (CCH) ¶ 38,291 (Dec. 3, 1984) (excerpts of PBOI Report).

[245] See 38 Fed. Reg. 27,940 (1973).

[246] See 43 Fed. Reg. 28,555 (1978).

[247] See 39 Fed. Reg. 32,907 (1974). Prior to this action, however, FDA withdrew its approval of Depo-Provera for use in pregnancy-related problems on the ground there was insufficient evidence it was effective for those purposes. 38 Fed. Reg. 27,940 (1973).

In October, 1974, less than two months after approval of the drug, FDA stayed its approval.[248] This action was prompted by Congressional concerns whether Depo-Provera increased the risk of cervical cancer.[249] In 1978, FDA withdrew its approval based on evidence indicating that Depo-Provera caused mammary tumors in beagle dogs.[250] In the same year, UpJohn waived its right to a formal evidentiary hearing and FDA granted its request for a PBOI.[251] When FDA invited interested persons to submit notices of participation,[252] forty-four persons responded and made presentations to the Board.[253] As a result, this proceeding was much larger than the one in Aspartame.[254]

In 1981, after the required nomination process, the FDA established the membership of the board in 1981 as Dr. Judith Weisz, of the Department of Obstetrics and Gynecology, Pennsylvania State University Medical Center, Dr. Griff Ross, of the Department of Research Medicine, University of Pennsylvania, and Dr. Paul Stolley, Associate Dean for Clinical Affairs, The University of Texas Medical School, Houston.[255] The hearing, however, was not convened until January, 1983.[256] In the intervening time period, there was a prehearing conference[257] and an opportunity for participants to submit information about Depo-Provera that post-dated FDA's 1978 decision to withdraw approval.[258]

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[248] 39 Fed. Reg. 38,226 (1974).

[249] Use of Advisory Committees by the Food and Drug Administration: Hearings Before the Subcomm. on Intergovernmental Relations, 93rd Cong., 2nd Sess. 323-41, 353-90 (1974).

[250] 43 Fed. Reg. 28,555 (1978).

[251] 44 Fed. Reg. 44,275 (1979).

[252] Id. at 44,274.

[253] Presenters included representatives from the Centers for Disease Control, the National Cancer Institute, the National World Health Network, the World Health Organization, the Agency for International Development, and a host of American medical schools. Transcript of Depo-Provera PBOI Hearing (No. 75N-0124) at 2-2a (Jan. 10, 1983), 2-2a (Jan. 11, 1983), 2-3 (Jan. 12, 1983), 2-2a (Jan. 13, 1983), and 1-1a (Jan. 14, 1983).

[254] Id.

[255] Transcript of Depo-Provera PBOI Hearing at 2 (No. 75N-0124) (Jan. 10, 1983).

3. The Hearing Process

The Depo-Provera hearing, which lasted five days,[259] was followed by a second, one-day hearing[260] to receive a special report from six consultants.[261] The initial hearing consisted of presentations by Upjohn, by the FDA Center for Drugs and Biologics, and by many nonparty participants.[262] Upjohn and the Bureau were each given one day for their presentations.[263] Three days were allocated to presentations by nonparty participants.[264] Unlike the Aspartame hearing, where witnesses appeared several times and discussed issues one at a time,[265] each presentor covered the issues before the PBOI as desired.

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[256] 47 Fed. Reg. 55,518 (1982).

[257] 47 Fed. Reg. 36,470 (1982).

[258] 47 Fed. Reg. 346 (1982).

[259] PBOI Report, supra note 244, at 4, 15.

[260] 48 Fed. Reg. 31,910 (1983).

[261] The panel consisted of "six consulting pathologists who reviewed the histopathology slides from the monkey studies to determine the nature and origin of the malignant tumors in two of twelve survivor monkeys in the high-dose Depo-Provera group." PBOI Report, supra n. 244, at 15.

[262] PBOI Report, supra note 244, at 4. A second, short hearing was held to receive the testimony of consultants hired by the Board to resolve a particular scientific problem. See supra notes 205-206 and accompanying text. The PBOI regulations provide for a second hearing for this purpose. See supra note 20 and accompanying text.

[263] Depo-Provera Hearing Record 2-3 (January 10, 1983); Depo-Provera Hearing Record 2-3 (January 11, 1983).

The Board members often asked questions of witnesses: many of these closely probed a witness about a particular matter or piece of evidence.[266] Questions by the parties and participants were handled differently as the hearing progressed. For the first day, the Board asked the questions they received at the end of the day when Upjohn had completed their presentations. For the remainder of the hearing, questions from participants were asked at the end of each presentation.[267] During the first two days, the Board attempted to ask all of the questions submitted by the participants. At the start of the third day, the Board announced that the previous policy had become unwieldy. The Board decided therefore to ask only those questions from participants that "will be helpful in obtaining the kind of information that we need to make our decision."[268]

The tenor of the proceeding was more like a legislative hearing than the scientific seminar atmosphere of the Aspartame proceeding. In the Aspartame hearing, there was often a direct dialogue or debate between the Board, the participants, and the consultants.[269] In the Depo-Provera hearing, there was no direct participation by anyone of that type. Questions by participants were funneled through the Board members.[270]

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[264] Depo-Provera PBOI Hearing Record 2-3 (January 12, 1983); Depo-Provera PBOI Hearing Record 2-3 (January 13, 1983); Depo-Provera PBOI Hearing Record 1-2 (January 14, 1983).

[265] _See supra_ notes 191-92 and accompanying text.

[266] _See e.g._, Depo-Provera PBOI Hearing Record 225-245 (January 11, 1983); Depo-Provera PBOI Hearing Record 11-25 (January 14, 1983); _see also_ Stribling interview, _supra_ note 152.

[267] Depo-Provera PBOI Hearing Record 4-5 (January 11, 1983).

[268] Depo-Provera PBOI Hearing Record 4 (January 12, 1983).

[269] _See supra_ notes 195-98 and accompanying text.

This hearing, however, was also conducted in a nonconfrontational and nonadversarial manner. Although the questioning was often sharp, it was of a more congenial nature than a cross-examination.[271] Further, there was almost no direct participation by lawyers in this proceeding with the exception that the legal counsel for some participants offered a closing summary of the evidence.[272]

4. Post-Hearing Process

In October, 1984, the PBOI submitted its decision.[273] The PBOI recommended that Depo-Provera should not be approved for use as a human contraceptive because of inadequate information regarding the drug's safety.[274] As of this time, the Commissioner has not issued a final report.

The Commissioner had charged the Board to resolve seven questions including "[w]hether, in comparison to other drugs approved for contraception, the benefits of Depo-Provera . . . outweigh its risks under conditions of general marketing."[275] The other questions addressed whether the drug had carcinogenic or teratogenic potential,[276] whether there were other problems associated with the drug[277] and whether the drug might be safe and effective for only some types of patients.[278]

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[270] See supra notes 266-68 and accompanying text.

[271] See supra note 266.

[272] Interview with Soloman Sobel, M.D., Director, Division of Metabolism & Endocrine Drug Products, FDA in Washington, D.C. (June 26, 1985).

[273] 49 Fed. Reg. 43,507 (1984).

[274] PBOI Report, supra note 244, at 179.

[275] PBOI Report, supra note 244, at 2.

The Board's recommendation that Depo-Provera not be approved was based principally on its concerns about the drug's carcinogenic effects.[279] Both dogs and monkeys who were administered Depo-Provera developed malignant tumors. The Board concluded that Upjohn's animal studies indicated that the drug might have been the cause of the tumors.[280] The Board rejected Upjohn's contention that, because of the physiological differences between experimental animals and humans, the animal studies were not relevant evidence of the carcinogenic potential for humans.[281] The Board also rejected Upjohn's contention that clinical data submitted by it successfully rebutted the inferences from the animal data that Depo-Provera might be carcinogenic. The Board concluded that although there were many published studies concerning the use of Depo-Provera in other countries, this data was inconclusive because it had numerous methodological problems.[282]

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[276] The Commissioner asked the Board whether "data from beagle dog and monkey studies submitted from Upjohn indicate a potential risk of breast or endometrial cancer in humans from Depo-Provera," whether "the human data submitted by Upjohn can, as Upjohn claims, successfully refute the risk of human cancer suggested by animal studies," and whether, "in the event of contraceptive failure, use of Depo-Provera may increase the risk of teratogenic effects to a greater extent than other systemic contraceptives." PBOI Report, supra note 244, at 2.

[277] The Commissioner asked the Board whether, "in view of Depo-Provera's adverse side effects or pharmacologic effect, estrogen therapy is likely to be prescribed in addition to Depo-Provera in a significant number of patients," and whether "an approval of Depo-Provera for contraception under general marketing conditions is likely to increase use of the drug as a contraceptive under conditions not stipulated in the approved labeling or whether is it (sic) likely to increase use of the drug for unrelated indications . . . ." Id. at 2. On its own initiative, the Board investigated whether the drug would affect bone and plasma lipoproteins. Id. at 7.

[278] The Commissioner asked the Board whether "there are conditions of labeling and distribution controls that would permit marketing of Depo-Provera as a safe and effective drug on a limited basis (i.e., Whether there may be certain patients in the U.S. for whom benefits of Depo-Provera for contraception outweigh the risks)." Id. at 2-3.

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[279] PBOI Report, *supra* note 244, at 173-75. The Board decided the other issues in a way that favored Upjohn or they declined to reach the issue in light of their disposition of the cancer issue. The PBOI decided that there was no evidence to suggest that Depo-Provera posed greater risks to fetuses than other approved contraceptives, *id.* at 115, that it was unlikely that estrogen therapy would be used in conjunction with the drug because it would be ineffective for that purpose, *id.* at 145, that no decision was necessary concerning possible unapproved uses in light of the Board's recommendation not to approve the drug, *id.* at 166, and that the drug should not be licensed for any limited group of women because risk-benefit decisions could be made appropriately only on a case-by-case basis. *Id.* at 169. One member of the Board would have approved Depo-Provera for two groups of women: the mentally retarded and drug addicts. *Id.* at 170.

[280] PBOI Report, *supra* note 244, at 24, 30-31, 69. The strongest evidence was the fact that the beagle dog study indicated a dose-response relationship or evidence that the frequency and timing of the tumors in the test group of animals varied in relationship to the amount of the drug administered. *Id.* at 30. *See supra* notes 34-47 and accompanying text (description of criteria used to evaluate animal studies).

[281] *See* Exceptions To Report of Public Board of Inquiry and Brief for the Upjohn Company 41-47, [In the Matter of] Depo-Provera Sterile Aqueous Suspension for Contraception, 78N-0124 (Jan. 24, 1985) [hereinafter cited as the Upjohn Exceptions]. The Board rejected Upjohn's argument on the grounds that although some physiological differences are generally recognized, many Upjohn claimed are speculative and unsubstantiated. PBOI Report, *supra* note 244, at 54, 64.

The Board's conclusions about the carcinogenic potential of Depo-Provera were based on an evaluation of the reliability of the available animal and clinical data.[283] The difference between the Board and Upjohn concerned whether extrapolation of the animal data was legitimate and whether clinical studies, which did not indicate that the drug caused cancer, had biological significance.[284]

C. Analysis of the Process

The FDA expected the PBOI could increase the effectiveness and the legitimacy of its decisions.[285] Not all of its expectations, however, were met. One of the anticipated benefits, a more expeditious process, did not materialize. The agency had underestimated the time and effort it would take to pick PBOI members and to produce an initial decision.

Despite these problems, the PBOI is a useful method for resolving cases in which the decision is composed principally of difficult issues of scientific judgment and where the resolution of those issues has a significant public effect. In such cases, the potential benefits of increased accuracy and legitimacy are likely to outweigh the costs associated with the PBOI. Further, FDA can take some steps to lower those costs and thereby make the PBOI a more attractive option.

The following section analyzes the Aspartame and Depo-Provera proceedings to explain the basis for these conclusions. The proceedings are analyzed according to their three components: the prehearing, hearing, and post-hearing stages. Each stage is evaluated to discover how it affected the benefits and costs of the PBOI process and whether those effects can be altered by appropriate reforms. Subsequent events are also considered as appropriate.

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[282] PBOI Report, *supra* note 244, at 80-81. The Board's principal objections were that there were too few women in each study and no long-term systematic studies had been conducted. *Id.* at 87-88. Other problems were inadequate or inappropriate control groups, failure to control or adjust for other causes of risk, lack of documentation, and lack of information on whether women in the United States were comparable. *Id.* at 85-88.

[283] *See supra* § 2B1.

[284] *See supra* notes 42-47 and accompanying text (discussion of extrapolation); *see supra* notes 39-41 and accompanying text (discussion of biological significance).

[285] *See supra* § 2D3.

1. The Pre-Hearing Process

The pre-hearing process is composed of four stages. First, FDA must decide whether to accede to a request for a PBOI. Second, FDA must determine how to frame the issues that the FDA will decide. Third, FDA must pick the members of the PBOI. Fourth, the parties engage in pre-hearing procedures such as a pre-hearing conference.

a. Choice of the PBOI

FDA evaluates requests for a PBOI without the benefit of published standards.[290] According to FDA's regulations, a PBOI will be held when the "Commissioner concludes, as a matter of discretion, that it is in the public interest to hold a public hearing before a Public Board of Inquiry . . . ."[291]

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[290] In addition to a lack of standards, some feel this stage has another problem. Where a third party objects that a food additive petition should not be granted and asks for a PBOI, the person whose petition would be at issue before the PBOI has no right to object to the use of that procedure. 41 Fed. Reg. 51,706, 51,711-712 (1976). This situation occurred in the Aspartame case. The request for the PBOI was by two third parties, Dr. Olney and Mr. Turner. See supra note 180 and accompanying text. FDA told the company that requested the additive regulation, Searle, that it had no right to prevent the agency from choosing the PBOI procedure. Interview with Robert Becker and Peter Safir, in Washington, D.C. (June 25, 1985).

FDA contends that its position is neither unfair nor unsound. FDA's intention is "to carefully consider the views of [a manufacturer] about the most appropriate forum . . . and [to consider denying] a request for an alternative forum of hearing if . . . such a procedure would prejudice the rights of [that person]." 41 Fed. Reg. at 51,712. Further, FDA correctly concludes that a company like Searle, whose petition has been granted, has no statutory right to a hearing. The Food, Drug, and Cosmetic Act grants the right to a hearing only if the petition for an additive regulation is denied. Id.; see supra note 168 and accompanying text. As a result, that company has no right to block a request for a PBOI by another party.

The potential unfairness to a company could be decreased if FDA would adopt a set of criteria that specified when it would grant a request to a PBOI. See infra notes 297-302 and accompanying text. FDA should include in these criteria that a PBOI would not be granted when it prejudiced the ability of a manufacturer to have a fair and accurate hearing.

At the time the procedures for the PBOI were adopted, one critic predicted that because of the lack of standards "the application of [the PBOI procedures] is likely to be erratic and arbitrary." Further, he noted that "[i]f there are no standards for the Commissioner's selection of cases, its use will not create public confidence in the procedure."[292]

FDA's actions, while not erratic, have confirmed the need for standards. In the Aspartame and Depo-Provera cases, FDA gave no indication why it approved the requests for a PBOI.[293] Subsequently, FDA has denied all requests for PBOIs on the grounds that its use will delay the regulatory process and that the issues presented, even if scientifically complex, are of the type with which the Administrative Law Judge has had experience.[294] In the context of these cases, these reasons appear to be reasonable ones.[295] Nevertheless, there have been informal indications that FDA intends to reject all requests, in any situation, for a PBOI because of its experiences in the

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[291] 21 C.F.R. §13.1(a) (1985).

[292] Thompson, Public Hearings--A View From The Bar, 32 FOOD DRUG COSM. L.J. 312, 314 (1977).

[293] See Depo-Provera Hearing On Proposal to Refuse Approval of Supplemental New Drug Application, 44 Fed. Reg. 44274 (1979); Aspartame: Ruling on Objections and Notice of Hearing Before a Public Board of Inquiry, 44 Fed. Reg. 31,716 (1985).

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[294] *See, e.g.*, Decision Denying Request for a Public Board Of Inquiry on the Proposed Withdrawal of Cyclandelate (Cyclospasmo), Doc. No. 84N-1068 (1985). In this decision, the Commissioner noted that:

> the issues presented by this proceeding are suitable for resolution by a formal evidentiary hearing . . . This form of hearing has worked well in previous hearings involving the application of the regulatory requirements for adequate and well-controlled studies . . . to particular drugs. Many of these hearings have involved difficult and complex issues. Through these hearings, the Administrative Law Judge has developed experience in handling the medical and legal issues presented by drug efficacy hearings that would be difficult to match in any alternative forum . . . Finally, establishing and conducting a Public Board of Inquiry . . . would cause unwarranted delay . . . .

Id. at 2-3.

[295] FDA has been particularly concerned about the delay because the requests for PBOIs have all come in cases where the agency wants to remove drugs from the market because of a lack of evidence that they are effective. Campbell interview, *supra* note 150. The drugs that FDA wants to remove from the market were approved by the agency before there was a statutory requirement that a manufacturer had to prove a drug was effective to gain approval. *See supra* notes 235-239 and accompanying text. Because Congress made the efficacy requirement retroactive, the issue in these cases is whether the manufacturer now has adequate evidence of efficacy. Since the drugs remain on the market during the pendency of the hearing process, FDA has a legitimate interest in attempting to remove them as soon as possible. *See* J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 285-316 (2d ed. 1985).

Aspartame and Depo-Provera cases.[296] If FDA has reached such a policy judgment, it has done so without the benefit of public input and without public acknowledgment of its position.

FDA should develop generic criteria by which requests for a PBOI would be granted or denied. This approach has four benefits. First, it would allow FDA to consider carefully the benefits and costs of the PBOI and to obtain public input concerning them. Second, the adoption of criteria would encourage applicants to apply for the use of the PBOI in appropriate cases. Third, those who applied for a PBOI would be better protected against arbitrary agency action by the existence of published criteria.[297] Finally, public confidence in the procedure would be enhanced by the existence of such criteria.

Later sections of this study identify some of the criteria that FDA might consider for its adoption. The study recommends that FDA consider whether a case presents difficult issues of scientific judgment,[298] whether those issues are of important significance to the public,[299] whether the case involves a large number of such issues so as to make it potentially unwieldy,[300] whether the creation of a PBOI would create significant transaction and salary costs to hire and maintain the board,[301] and whether the use of a PBOI is likely to delay significantly the resolution of a controversy because of the time necessary to choose Board members, hold a hearing, and have them write an opinion.[302]

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[296] Stribling interview, supra note 152; Interview with Linda Horton, in Washington, D.C. (June 24, 1985). The agency's distaste for the PBOI apparently is based on the difficulty of obtaining persons to serve on the Board and the time it takes a Board to issue a decision. These problems are considered in later sections. See infra §§ IIIC1c(1) & IC3a.

[297] Cf. Davis, An Approach to Legal Control of the Police, 52 TEX. L. REV. 703, 705 (1974).

[298] See infra notes 331, 347 and accompanying text.

[299] Id.

[300] See infra note 443 and accompanying text.

[301] See infra note 376 and accompanying text.

b. Formulation of the Issues

Once FDA has decided to use the PBOI procedure, it specifies what questions, or "charges," the Panel is to address. Critics have contended there are two problems with FDA's choice of issues in the two cases. One objection is that a PBOI should not be assigned the responsibility to make "regulatory" judgments. The other objection is that because FDA can not avoid making such assignments, the PBOI is of doubtful utility.

The two PBOIs were required to make both "scientific" and "regulatory" judgments. Some judgments were "scientific" because their resolution required the application of scientific knowledge and experience.[303] For example, one charge was whether the ingestion of Aspartame may induce brain tumors in rats.[304] To answer, the Board had to evaluate the scientific reliability of the rat studies.[305] Other judgments were "regulatory" because they required the application of legal or policy-making knowledge or experience.[306] For example, one charge to the Board was whether Aspartame should be approved for use in foods in light of the scientific evidence.[307] This decision, which involved an application of FDA's statutory standards of "safety," was clearly regulatory in character.[308]

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[302] See infra note 442 and accompanying text.

[303] See supra § 2B.

[304] See supra note 186 and accompanying text.

[305] See supra § 2B (description of Board's method of evaluation); supra notes 38-41 and accompanying text (description of judgmental nature of scientific evaluation).

[306] See supra § 2B.

[307] Supra § 2B.

[308] See supra notes 164-166 and accompanying text.

Professor Brannigan has recommended that FDA should submit only "scientific questions" to a PBOI.[309] He therefore approves of the fact that the Aspartame Board was asked whether the additive caused brain tumors in rats.[310] He is dubious, however, that the structure and makeup of a PBOI qualify it to make "regulatory decisions." He argues that scientists lack the training or experience to analyze the policy opinions involved in such issues. He therefore disapproves of the fact that the Aspartame Board was asked whether Aspartame should be allowed for use in foods.[311]

Although Professor Brannigan is correct that scientists do not necessarily have any expertise concerning the resolution of issues of regulatory judgment,[312] it does not follow that FDA should avoid the submission of those issues to a PBOI. There are four reasons to allow the PBOI to consider such issues. First, although scientists do not necessarily have expertise in those matters, individual scientists, based on their experiences with regulatory matters, might have significant insights they can offer. Second, as explained in Part I, regulatory judgments must be made with an appreciation of the nature of scientific judgments and their relationship to regulation.[313] Scientists can be of assistance in understanding that interrelationship.[314] Third, since the PBOI is used instead of a formal evidentiary hearing, the legitimacy of the process depends, in part, on offering participants in the hearing the opportunity to comment on any relevant issue including policy issues. Finally, because the decision of the PBOI is only a recommendation to the Commissioner, the PBOI's regulatory judgments will be accepted only if the Board is able to marshall persuasive reasons for them. Moreover, if necessary, the Commissioner can hold a separate hearing to hear the views of participants concerning regulatory issues he specifies.[315]

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[309] Brannigan, The First FDA Public Board of Inquiry: The Aspartame Case, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 201 (J. Nyhart & M. Carrow, eds. 1983).

[310] Id. at 184; see supra note 186 and accompanying text (FDA charges to Aspartame Board).

[311] Brannigan, supra note 309, at 184-85, 188-89; see supra note 186 and accompanying text (FDA charges to Aspartame Board). The same conclusion was reached in Note, The FDA's Public Board of Inquiry and the Aspartame Decision, 58 IND. L.J. 626, 639 (1983) [hereinafter cited as FDA's Public Board of Inquiry].

[312] See McGarity, supra note 33, at 747-48.

[313] See supra note 33 and accompanying text (description of regulatory judgment).

When FDA asks a PBOI about regulatory matters, however, the agency should ask the Board two types of questions. First, FDA should ask the Board what is the probability that a chemical is safe in light of its evaluation of all of the relevant evidence. In this way, FDA asks the Board to reach an overall scientific judgment that considers its answers to the other charges.[316] Moreover, the Board is asked to respond in terms that scientists will find familiar. Scientific evaluation normally consists of probabilistic evaluation.[317] Second, FDA should ask the Board what action is justified by the Board's conclusion concerning the probability of harm. This method of asking the question separates the question of scientific judgment, which concerns the probability of harm, from the regulatory question, which concerns what action FDA ought to take.[318]

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[314] See Grobstein, supra note 110, at 129:

> The . . . need for scientific analysis . . . goes beyond the simple assembly and interpretation of existing data . . . Beyond this, scientific expertise is necessary to recognize the need for new data accumulation to anticipate emerging issues, to point to possible or probable implications of new courses of action of changes of circumstance, to interpret for various audiences the scientific and technical content of politic issues, and to provide access to decision makers to the best and latest technical information. . . . This is the content of . . . policy-centered and decision-oriented science . . ."

[315] See 21 C.F.R. § 12.125(f) (1985) (Commissioner may invite participants who appeal an initial decision to file briefs or make oral presentations).

[316] See supra notes 32-33 and accompanying text.

[317] See Mashaw, An Overview: Two Models of Regulatory Decision Making, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 17-18 (J. Nyhart & M. Carrow eds. 1983).

Nancy Buc, a former FDA General Counsel, has argued that the PBOI is of little practical benefit because its expertise is significantly, if not entirely, restricted to issues involving scientific judgment. She contends that the "government cannot be informed solely by science, although it cannot govern without science."[319] The reason is that health and safety questions are too often matters of regulatory judgment. Buc asserts that "there are so many more issues [besides issues of science judgment] that ought to go into the business of governing, that a PBOI winds up as too small a piece of what the total process ought to be about.[320] Similar criticism have been made of the science court proposal.[321]

These critics, however, underestimate the value of the PBOI procedure. Even if the PBOI is not practical in the vast majority of FDA's cases, there are some cases that present significant and difficult issues of scientific judgment. In Aspartame, for example, FDA was asked to decide the safety of a food additive that would be widely used by the American public.[322] Public interest in the issue was significant because FDA had previously acted to remove two other artificial sweeteners from the market on the ground they were unsafe.[323] There was the same type of public interest in the resolution of the Depo-Provera case because the drug had been approved as a contraceptive by almost every other country in the world.[324]

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[318] Id. at 18.

[319] Buc, Comment, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 206 (J. Nyhart & M. Carrow, eds. 1983).

[320] Id.

[321] See supra note 91 and accompanying text.

[322] See supra note 158 and accompanying text.

[323] See supra notes 158-62 and accompanying text.

In these circumstances, FDA gains two advantages from the PBOI process. First, it has the opportunity to have the issues requiring scientific judgment aired before a panel of experts. There is a potential increase in accuracy that occurs as a result.[325] This potential arises even if the panel can offer no particular assistance to the agency concerning issues of regulatory judgment.[326] Moreover, this advantage occurs even if FDA ultimately disagrees with the PBOI. To overrule the Panel, the Commissioner must be able to rebut the conclusions of the Panel. A PBOI therefore should force FDA to take a "hard look" at whether the agency's position is correct.[327] Second, the legitimacy of the agency's decision making process is enhanced by the participation of experts who are independent of the agency.[328] The fact that FDA is willing to subject its decisions to this type of strict scrutiny should improve public confidence in agency decision-making. Because the Board's written decision and the transcript of its hearing are available for purposes of judicial review,[329] FDA is setting a more difficult task for itself. To overrule the PBOI, the agency will have to confront the Board's initial decision and offer reasonable grounds for overruling it.[330]

Although the PBOI can be useful in the resolution of regulatory issues, it is most useful for the resolution of scientific disputes. FDA should take this fact into account when it creates the criteria that will indicate when a PBOI is to be used.[331] Cases that involve only regulatory issues probably are suitable for a PBOI. In those cases, the costs associated with a PBOI will likely exceed the benefits to be gained.

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[324] See supra notes 230-34 and accompanying text.

[325] See infra notes 377-403 and accompanying text.

[326] The Panel, however, may be able to offer some assistance on these issues as well. See supra notes 313-314 and accompanying text.

[327] See D. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 7, at § 7.5.2 (description of "hard look" review by federal courts).

[328] See supra notes 128, 147-52 and accompanying text.

[329] See infra note 457 and accompanying text.

[330] R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 7, at § 9.3.6, at 504.

c. Choice of the Board Members

After FDA specifies the issues to be decided by the PBOI, it chooses the members of the Board from persons nominated by the participants.[332] Two aspects of this stage require evaluation. The most significant is that this process has delayed the regulatory process because of the difficulty in finding qualified scientists to serve as Board members. The other is that some commentators believe that the nomination process is potentially unfair and inconsistent with the purpose of the PBOI.

(1) Selection of Members

The difficulty in finding qualified Board members significantly delayed the Depo-Provera hearing. In that case, the appointment process took over two years.[333] Any time delay in the approval of Aspartame attributable to the difficulty of selecting board members can not be measured because, after the first two stages, the proceeding was stayed for over three years while FDA investigated the authenticity of Searle's test data.[334]

Finding persons qualified to serve is time-consuming for three reasons. First, Board members must pass FDA's strict confict-of-interest rules.[335] These rules will prevent the choice of many experts because they worked previously for the company whose product is the subject of the hearing or because they have published papers taking a position on some issue relevant to the hearing.[336] Second, there are only a limited number of persons who have the skills, in addition to scientific expertise, necessary to be effective on a PBOI.[337] These include the writing ability to author an initial decision that is understandable to nonscientists, the communication capacity to talk effectively with lawyers and other nonscientists, the management skills to manage the hearing process, the interest in dealing with numerous details, and the willingness to make difficult decisions in controversial matters.[338] Third, many of those persons are unwilling to serve because of the time commitment necessary.[339] Board members must read relevant FDA documents and scientific articles,[340] must participate in a hearing that last several days,[341] and must author an initial decision that can be of considerable length and complexity.[342]

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[331] See supra notes 292-96 and accompanying text (recommendation that FDA establish criteria for choice of PBOI).

[332] See supra note 13.

[333] The Depo-Provera hearing was announced in July, 1979. Depo-Provera Hearing On Proposal To Refuse Approval of Supplemental New Drug Application, 44 Fed. Reg. 44275 (1979). The Board was not established, however, until September, 1981. PBOI Report, supra note 244, at 14.

Any time delay in Aspartame attributable to the difficulty of selecting board members can not be measured because, after the first two stages, the proceeding was stayed for over three years while FDA investigated the authenticity of Searle's test data. See supra notes 184-85 and accompanying text.

[334] See supra notes 184-85 and accompanying text.

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[335] 21 C.F.R. §§ 13.10(b) (1985); see generally Review Panel on New Drug Regulation, Department of Health, Education, and Welfare, Interim Report: Conflicts of Interest on Standing Advisory Committees of the Bureau of Drugs, FDA (1977).

[336] Conflict-of-interest problems were prominent in both the Aspartame and Depo-Provera cases. In the Aspartame cases, Dr. Olney objected to the inclusion of Dr. Vernon Young on the Board because Young had written articles with Searle researchers about chemicals other than Aspartame. The Commissioner dismissed the objection as being untimely. See Brannigan, supra note 309, at 186. In the Depo-Provera case, Upjohn objected to the fact that Dr. Paul Stolle had been an expert witness in a tort action that concerned contraceptives. To solve the objection, Dr. Stolle agreed to recuse himself from certain issues in the hearing. Copp & Campbell interviews, supra note 150.

[337] In the Aspartame case, FDA, because of the difficulty in finding qualified persons, ended up with two persons from the same institution. Both Dr. Vernon Young and Dr. Walle Dauta were from the Massachusetts Institute of Technology. Interview with Marsha Gardner, Counsel for the Center for Food Safety & Applied Nutrition, FDA, Aspartame Hearing, in Washington, D.C. (June 24, 1985).

[338] Becker and Safir interviews, supra note 197; Stribling interview, supra note 152; Telephone interview with Robert Temple, Director of Drug Research, FDA, (July 1, 1985).

Several steps can be taken to decrease the difficulty in selecting Board members. First, FDA may be able to decrease some of the conflict-of-interest problems by greater reliance on government scientists. For example, the Commissioner, who has the right to choose the chairperson, could choose a government scientist for that position.[343] Government scientists, however, may be as busy as their private counterparts and therefore unwilling to serve. Other government scientists may lack the necessary stature to serve. Second, invitations to serve on the PBOI should come from the Commissioner or other high-ranking agency officials to indicate the importance of this service. Personal intervention of this type might convince reluctant nominees to serve.

Finally, the agency can make the position more attractive by making Board service less time-consuming. A later section of this study recommends that FDA authorize Board members to hire persons to serve the same function as law clerks, that FDA offer the Board clerical support for the preparation of written decisions, and that FDA institute record management procedures that would allow more efficient access of documents.[344] Further, PBOI's can act to make their own responsibilities easier. For example, participants could be required to file pre-hearing briefs and written statements of their testimony to assist the Board in its evaluation of the evidence. Moreover, Boards could rely to a greater extent on their legal advisor, appointed by FDA, to formulate and write the PBOI's decision.[345]

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[339] Copp & Campbell interviews, _supra_ note 150. Rothstein interview, _infra_ note 340.

[340] Interview with Beverly Rothstein, Counsel for the Aspartame PBOI, in Washington, D.C. (June 26, 1985).

[341] _See supra_ notes 191, 259-260 and accompanying text.

[342] The Depo-Provera Initial Decision, for example, is over two-hundred pages long. PBOI Report, _supra_ note 244; _see infra_ notes 424-449 and accompanying text (discussion of difficulty of writing initial decision).

[343] _See_ 21 C.F.R. § 13.10(c) (1985). The Center for Drugs or the Center for Food Additives could also nominate government scientists. _See id._ at 13.10(b); _see generally supra_ note 13 (procedures to choose Board members).

FDA could take another action to improve the process of selecting Board members and also the prior aspects of the pre-hearing stage. Part of the time delay was apparently caused because no one person was in charge of the PBOI process in the same manner that an ALJ is in charge of a formal hearing. Responsibility for negotiation of the charges to the Board was handled by persons in the General Counsel's office. Responsibility to choose Board members was handled by persons in the Commissioner's office. This division of responsibility hampered both activities because no one was in a position to speed the process along. As a remedy, the Commissioner should appoint a Chairperson as soon as a PBOI is chosen as the hearing method. The Chairperson, and the attorney advisor for the Board, would then be in a position to take the appropriate actions to ensure an efficient process. The Chairperson could act in the same manner as an ALJ to manage the case and to threaten sanctions against any party who is dilatory.[346]

Even if the previous steps are taken, FDA likely will continue to have some difficulty in attracting Board members. As a result, it is unlikely that the PBOI process could be used very often. This limitation suggests that FDA ought to restrict use of the PBOI to cases involving difficult issues of scientific judgment of significant interest to the public.[347]

For a limited number of cases, however, FDA should be able to recruit the necessary assistance. Moreover the infrequent use of the PBOI may be sufficient to handle the number of controversies that would require the use of such a procedure. For example, FDA has been able to resolve almost all controversies about new drugs as administrative matter. Dean

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[344] See infra notes 440-41 and accompanying text.

[345] Id.

[346] See Telephone Interview of Richard Merrill, former FDA General Counsel (August 15, 1985).

[347] See supra notes 292-96 and accompanying text (recommendation that FDA establish criteria for choice of PBOI).

Merrill and Professor Mashaw report that the "agency and the applicant generally reach agreement on conditions for the release of a drug for which a formal NDA has been filed; when the agency appears unlikely to be persuaded, the applicant typically never submits a completed NDA."[348] As a result, FDA has held only three formal hearings on a refusal to approve a new drug since 1962.[349]

(2) Nomination Process

Some commentators have expressed concerns about the method FDA uses to choose Board members.[350] The method works as follows. The Commissioner chooses one Board member from the nominations submitted by the petitioner who requested the PBOI or submitted by the FDA staff involved in the hearing. A second person is chosen from nominations by the other persons who indicated their intention to be participants in the proceeding. The Commissioner chooses the third person, who is the chairperson, in his discretion.[351]

Critics have noted that the Commissioner can avoid choosing anyone nominated by the petitioner as a Board member. Only one Board member is chosen from the combined nominations of the petitioner and the FDA division that will participate. If the petitioner is opposing a decision by FDA to approve a product, the petitioner and the FDA division will have antagonistic interests. The failure to choose a nominee of the petitioner in this situation could threaten the legitimacy of the process.[352] The solution would be to change the nomination process so that the Commissioner selects one member from nominees submitted by those supporting FDA's actions, one from those opposing the action, and a third of his choice.[353]

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[348] J. MASHAW & R. MERRILL, supra note 295, at 288.

[349] Id. Other formal evidentiary hearings have been held to determine whether drugs approved by the agency prior to 1962 can remain on the market. These hearings are necessary to determine whether drugs marketed prior to 1962 meet the requirement Congress imposed at that time that a manufacturer must establish the efficacy, as well as the safety, of its drugs for FDA approval. Id. at 288-290. FDA, however, has often avoided the necessity to hold these second type of hearings on the ground that the manufacturer failed to provide any evidence that its product was effective. Id. at 290; see generally supra notes 68-69 and accompanying text. Further, it is unlikely that this second type of hearing would be suitable for a PBOI because these cases rarely involve significant issues of scientific judgment. See supra notes 294-295 and accompanying text.

[350] See Thompson, supra note 292, at 314-15; see Note, supra note 311, at 644.

[351] 21 C.F.R. §13.10(b).

Another source of concern is the belief that a nomination process is inappropriate for this type of hearing body. Critics note that by using this process, FDA allows participants to recommend persons they believe will support their position.[354] One commentator is worried that the result will be a procedure "open to controversy" since it "places potential partisans in positions that should be neutral." The commentator's solution is to have an independent body such as the National Academy of Sciences select the Board members.[355]

The premise of the last criticism is unsound. The legitimacy of the PBOI is enhanced by the fact that participants have a voice in the selection of the Board. In this sense, it is similar to arbitration boards.[356] Further, FDA's stringent conflict-of-interest rules are a sufficient guarantee of the neutrality of the Board members. These requirements will screen out anyone who has prejudged a particular controversy.[357] Finally, administrative decision-makers have never been disqualified because of prejudgment of broad policy matters as opposed to prejudgment of particular facts.[358] Under this test, parties are free to nominate a scientist because that person has expressed general views about scientific controversies.

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[352] Thompson, *supra* note 292, at 314-15.

[353] *Id*.

[354] *See* Becker and Safir interviews, *supra* note 197; *FDA's Public Board of Inquiry*, *supra* note 311 at 644.

[355] *FDA's Public Board of Inquiry*, *supra* note 311, at 644.

[356] R. GORMAN, LABOR LAW: UNIONIZATION & COLLECTIVE BARGAINING 542 (1976).

[357] *See* *supra* note 335 and accompanying text.

[358] R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 7, at §9.2.2.

d. Other Procedures

Finally, four other aspects of the pre-hearing stage require brief examination. They are whether parties should have additional discovery rights, whether the use of a pre-hearing conference should be required, whether the role of lawyers should be deemphasized, and whether the PBOI creates unacceptable administrative burdens.

Existing pre-hearing procedures set out two discovery procedures. Submissions for the hearing record are filed with FDA before the hearing and parties receive either a copy of or notification of such filings.[359] Further parties are required to specify the nature of the arguments they intend to present including identification of their witnesses and the evidence on which they intend to rely.[360]

Some commentators would have FDA consider whether additional discovery procedures, such as written interrogatories, would be useful.[361] Based on FDA's experience in the two cases, however, additional discovery appears unnecessary. There was no indication in either case that any of the parties were disadvantaged or surprised by arguments from other parties. This is because scientific disputes concern the evaluation of scientific studies that are publicly available from the agency or in the literature.[362] As a result, FDA's requirement that parties must indicate the evidence on which they intend to rely is sufficient to avoid unfair surprise.

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[359] 21 C.F.R. § 13.20 (1985).

[360] *Id.* at § 13.25.

[361] *FDA's Public Board of Inquiry*, *supra* note 248, at 642-43; *see generally* Koch, *Discovery in Rulemaking*, 1977 DUKE L.J. 295, 345.

[362] *See supra* § 2B.

In addition to the required procedures, the Boards in both cases held a a pre-hearing conference.[363] The conferences were used to allocate the time for presentations, to consider the other procedures to be used in the hearing, and to emphasize the Board's desire to avoid an adversarial proceeding.[364] Since those involved believe the conferences contributed to the success of the hearing process,[365] their use should be continued.

Some observers are disappointed that lawyers played such a prominent role in the prehearing process. They believe it detracted from the "scientific" nature of the proceeding and contributed to the delays that occurred.[366] Lawyers functioned to negotiate the issues that would be heard by the Board[367], to settle the procedures that the Board would use,[368] to submit documents and prepare witnesses,[369] and to "police" whether the participants were obeying the procedural regulations.[370] Other observers believe that this type of participation is essential if the hearing is to be well-run and well-organized.[371]

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[363] Depo-Provera Sterile Aqueous Suspension: Notice of Prehearing Conference on Proposal To Refuse Approval of Supplement New Drug Application, 47 Fed. Reg. 36470 (1982); Rothstein interview, *supra* note 342.

[364] Stribling interview, *supra* note 109; Rothstein interview, *supra* note 342.

[365] *Id.*

[366] Hutt interview, *supra* note 136; *cf.* Brannigan, *supra* note 309, at 184.

[367] *See* Brannigan, *supra* note 309, at 182-84.

[368] *See, e.g.*, Letter from Thomas Mansage, Associate General Counsel, Upjohn Company, to Linda Quinones, Chief of FDA Documents Branch (October 15, 1981) (discussing procedures and timetables for Depo-Provera PBOI); Letter from Diane Silberstein, Counsel for National Women's Health Network, to Dr. Judith Weisz, Chairperson, Depo-Provera POBI (October 26, 1982) (discussing clarification of procedures).

[369] Copp and Campbell interviews, *supra* note 152.

There is no evidence that the legal maneuvering that occurred during the pre-trial process was a significant cause of delay. Further, because lawyers are trained to orchestrate the presentation of evidence, their participation probably aids the organization of the PBOI process. Finally, it is doubtful that FDA could limit the participation of lawyers in the pre-trial process without discouraging the use of the PBOI or possibly infringing the due process rights of the parties.

A final matter that requires attention is that the PBOI has been characterized "an administrative nightmare".[372] The reason is that the PBOI creates costly administrative responsibilities for the agency. These include the transaction and salary costs of hiring the Board members as special employees of the agency[373], the transaction and logistical costs of holding a PBOI hearing,[374] and the costs of assigning one or more lawyers to the Board as counsel to give legal and procedural advice.[375]

In light of these expenses, FDA might want to use "cost" as one of the criteria it establishes to determine whether to hold a PBOI. A previous section recommended that the agency establish such criteria.[376] At the same time, the agency should be able to decrease its transaction costs as it becomes more familiar with the administration of a PBOI. For example, one reason for high transaction costs was that personnel in the Commissioner's office had little previous experience in the management of advisory committee meetings or other activities similar to the management of the PBOI.[377]

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[370] See Brannigan, supra note 309, at 192-94 (description of Upjohn's objections to Dr. Olney's submissions). The "policing" function even included negotiations concerning whether or not the Depo-Provera hearing could be video-taped. See Letter from Mark Novitch, M.D., FDA Deputy Commissioner, to William B. Schultz, Counsel for Public Citizen (January 5, 1983) (denial of appeal of ruling that no video-taping could take place).

[371] See, e.g., Copp and Campbell interviews, supra note 152.

[372] Stribling interview, supra note 152.

[373] See 21 C.F.R. at § 1310(e).

[374] Stribling interview, supra note 152.

[375] See 21 C.F.R. at § 13.15(b).

2. The Hearing Stage

The pre-hearing stage served its purpose to facilitate an orderly and effective hearing, but at the cost of considerable delay. Many of the causes for the delay could be remedied, but the difficulty of finding Board members will continue to be a problem. The advantages of the PBOI, identified in this section, must be weighed against that disadvantage.

The hearing stage of the PBOI has three advantages over conventional procedures. First, there is a more thorough and scientifically sophisticated consideration of the issues. Second, Board members have greater flexibility to identify and procure information that is missing from the hearing record. Three, the PBOI process offers more opportunity for interested parties to participate. The significance of these advantages and possible limitations on them are considered in this section.

a. Quality of the Process

The Aspartame and Depo-Provera hearings were both noteworthy for the depth and sophistication of the scientific presentations and discussions.[378] One commentator has called the Aspartame hearing "a model scientific debate" in which "the issues were presented sharply."[379] Participants were particularly impressed that the Board members were sufficiently familiar with the evidence that they often corrected witnesses who made misstatements about it.[380]

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[376] See supra notes 292-96 and accompanying text (recommendation that FDA establish criteria for choice of PBOI).

[377] Horton interview, supra note 336.

[378] See supra notes 192-98, 266-71 and accompanying text.

[379] Brannigan, supra note 309, at 194. Another commentator concluded that the "board was successful in crystalizing and narrowing the issues and brought independent expert assessment into the decisionmaking process. The FDA's Public Board of Inquiry, supra note 248, at 636-37.

The previous aspect of the PBOI distinguishes it from FDA's other methods of obtaining scientific input. As previously reported, there are three such alternatives. First, FDA has a system of standing and ad hoc advisory committees from which it obtains recommendations whether drugs and food additives should be licensed.[381] Second, it can use institutional advisory committees such as the National Academy of Sciences National Research Council (NAS-NRC).[382] Third, scientists appear as expert witnesses in formal evidentiary hearings.[383] The relative advantages of the PBOI over each method is explained in this section.

The PBOIs were more successful in producing a thorough review of the issues than most advisory committees for several reasons. First, the presentations of witnesses before an advisory committee often tend to provide only background information. Further, because the presentations occur before FDA has reached a decision concerning a product, they may fail to address issues that the agency finds to be important later in the decision-making process.[384] Second, many advisory committee members do not brief themselves as well concerning the presentations by reading the relevant documents or scientific literature. As a result, the witnesses and committee members do not interact in the same manner that occurred during the PBOIs.[385] Third, PBOI members are more likely to have expertise concerning the specific matters under discussion. Advisory committee members, by comparison, are more likely to be generalists because committee members are picked to represent a

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380. See, e.g., Stribling interview, supra note 152.

381. See supra notes 137-46 and accompanying text.

314.2 See supra notes 110-111 and accompanying text.

383. See supra notes 112-113 and accompanying text.

384. Temple Interview supra note 340.

385. USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 81; Stribling interview, supra note 152; Gardner interview, supra note 339.

broader range of expertise.[386] Fourth, advisory committee meetings only last for several hours thereby limiting the attention that can be given to an issue.[387] Fifth, advisory committee members sometimes view their role as representing the interests of some constituency such as a particular group of physicians.[388] Board members, who were praised for their impartiality,[389] are less likely to view their role in that manner.

The differences identified between the PBOI and advisory committees affect the type of advice FDA receives. In the advisory committee setting, committee members give FDA their impressions or opinions of what decisions are appropriate based a brief review of the available evidence and on past familiarity with a controversy. Moreover, the results of advisory committee meetings are usually reported in the form of minutes, written by an FDA employee, or in other documents that briefly summarize the disposition of a matter. These reports may not identify clearly either the questions FDA posed to an advisory committee or the specific answers the committee has formulated and the basis for those answers.[390] For example, the Chairperson of the Depo-Provera PBOI reported that she was unable to determine the basis for advisory committee recommendations for Depo-Provera from the available documentation.[391]

Members of the PBOI, by comparsion, offer FDA an expert assessment of the relevant evidence in an accountable manner. The difference occurs because only the PBOI scientists are required to defend their judgments by evaluation and explanation of the relevant scientific evidence in a document written for that purpose.

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[386] See supra note 141 and accompanying text. See also Hoffman, The FDA's New Forms of Public Hearings--Choosing Among the Alternatives, 32 FOOD DRUG COSM. L.J. 330, 336-37 (1977); Sobel interview, supra note 272; Becker & Safir interviews, supra note 197.

[387] USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 97-99.

[319] Copp and Campbell interviews, supra note 107.

[320] Temple interview, supra note 275.

[390] THE USE OF STANDING ADVISORY COMMITTEES, supra note 102, at 111-114.

[391] Telephone Interview of Judith Weisz, M.D., Chairperson Depo Provera DPOI (August 15, 1985).

Some of the disadvantages of advisory committees can be overcome if FDA required higher standards of performance from committee members.[392] Further, FDA has a mechanism to use an advisory committee for input during its hearing process. FDA regulations authorize the use of a hearing before an advisory committee instead of a formal evidentiary hearing or a PBOI.[393] With these changes, the quality of input from an advisory committee and a PBOI might be similar. The advisory committee, however, may still lack specialists in the particular fields about which there is a controversy. Moreover, litigants are unlikely to agree to an advisory committee hearing unless FDA requires separation of functions and prohibits ex parte contacts. Those restrictions apply to a PBOI, but they do not currently apply to an advisory committee hearing.[394]

Many of the same advantages that FDA obtains from a PBOI may be available when consultation of an institution like the NAS-NRC is sought. One commentator recently reported, "The NAS has a unique status as an independent, congressionally chartered, and prestigious institution with a good record in providing advice on science and technology to the federal government, including advice on regulatory processes.[395] As a general matter, however, NAS-NRC committees do not engage in the type of hearing process used by the PBOI.[396] Further, the expense of obtaining an NAS-NRC review makes it a less attractive option than the PBOI. Finally, the PBOI process allows FDA to obtain expert, independent advice as part of its hearing process. The NAS-NRC option would not be available for the same purpose.

PBOI has several advantages over a formal evidentiary hearing. First, PBOI members are more likely to have assimilated the scientific evidence before the hearing.[397] Unlike an ALJ, they have only one hearing to prepare and their professional careers have been spent reading and understanding this type of evidence. As a result, the Board members were better able to actively question witnesses, particularly concerning the ambiguities or limitations in the data they were citing.[398]

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[392] FINAL REPORT, _supra_ note 142, at 57-59.

[393] 21 C.F.R. §§14.1-14.174 (1985).

[394] _Compare_ 21 C.F.R. at §13.15 (PBOI separation of functions and ex parte prohibitions) _with_ 21 C.F.R. at §14.29 (advisory committee hearing procedures without previous restrictions).

[395] Grobstein, _supra_ note 110, at 133.

[396] _Id_. at 118-122, 127.

Second, the PBOI is more likely to attract the participation of outstanding scientists as witnesses because of its nonadversarial nature. Many scientists are unwilling to testify in a formal evidentiary hearing because of the adversarial nature of the hearing process.[399] Scientists prefer to operate according to traditional scientific methods that stress collegiality.[400]

Third, the PBOI is more likely to include an examination of ill-defined issues. Many scientists believe that there is a tendency for lawyers, and for traditional hearings, to focus only on questions that can be defined in a concrete fashion.[401]

Fourth, the PBOI is more likely to consider the scientific sufficiency of FDA's actions than an ALJ. Most persons who challenge FDA actions believe they have little or no chance in prevailing before FDA's ALJ because he reportedly has never decided against the agency.[402] One significant reason is that the agency will take actions that lead to a hearing only when they have a strong legal case. Because of the ALJ's legal orientation, FDA has always prevailed in these cases.[403]

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[397] Rothstein interview, supra note 150.

[398] Copp and Campbell interviews, supra note 150; see supra notes 144, 215-216 and accompanying text.

[399] Gardner interview, supra note 339; Stribling interview, supra note 152.

[400] See infra notes 471-72 and accompanying text.

[401] Temple interview, supra note 340.

[402] Hutt interview, supra note 136; Copp & Campbell interviews, supra note 150. Becker & Safir interviews, supra note 197.

Despite these advantages, some commentators are not convinced that the process is better because it is nonadversarial.[404] They contend that an opportunity to challenge the admissibility of evidence is essential to prevent erroneous information from entering the record and that cross-examination is essential to alert the decision-maker to errors in testimony. They conclude that the PBOI may be less accurate than a conventional hearing as a result.[405] One recommendation is that parties should be given expanded rights to cross-examine witnesses and object to the inclusion of irrelevant or immaterial evidence.[406]

These criticisms confuse the fact that agencies use two different models by which they obtain scientific input. As previously explained,[407] in one model, scientific generalists are employed to give advice because they are better able to understand questions of scientific judgment than laymen or lawyers. These scientists, however, may not have any specific knowledge or experience with the subject of the inquiry. Their advice, however, is either advisory in nature or is subjected to the requirements of a formal hearing process.[408] In the other model, scientific specialists are employed because they are experts in the particular field of inquiry and because they possess their own firsthand knowledge about a controversy. When these specialists are used, such as in a PBOI, different procedures would be appropriate.

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[403] Copp and Campbell interviews, supra note 150.

[404] See, e.g., Hoffman, supra note 386, at 336-37; Thompson, supra note 292, at 315.

[405] Hoffman, supra note 386, at 336-37; Thompson, supra note 292, at 315; see generally supra note 81 (arguments for the use of cross-examination in hybrid rulemaking).

[406] FDA's Public Board of Inquiry, supra note 311, at 641-42.

[407] See supra § IID2.

[408] Id.

Adversarial procedures are less necessary for a PBOI because Board members are recognized experts with specific knowledge about a particular controversy. As a result, they are more likely to recognize incorrect information than an ALJ.[409] Moreover, scientists are trained to identify mistakes and biases in each other's work. The scientific method is based on a tradition where each scientist's work is subject to formal and informal review by other scientists.[410] When the members of a PBOI conduct their hearing, they are engaged in the same process for the same purpose. Finally, there may not be much actual difference between a PBOI and a formal hearing in terms of the types of evidence admitted. ALJs commonly allow most types of evidence to be admitted to avoid possible reversal.[411]

The ability of Board members to find errors, however, is dependent on their level of expertise.[412] This fact creates potential limitations for the PBOI process. One is that the process will be successful only if FDA can recruit able scientists to serve as Board members. The previous section discussed the fact that FDA has had difficulty in finding qualified persons to serve on POBIs. This problem may limit the availability of the PBOI process as a practical matter.[413]

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[409] Becker and Safir interviews, supra note 197.

[410] McGarity & Shapiro, supra note 29, at 841.

[411] See Hoffman, supra note 386, at 336.

[412] One commentator has expressed a related concern that only one member of a Board may be an expert concerning some of the issues that will be presented. This would occur when FDA appoints persons of different scientific backgrounds because there is a wide diversity of scientific issues to be considered. He argues that since the person with the most expertise may dominate the process concerning some issues, the participants, in effect, are denied a hearing before all three Board members. Brannigan, supra note 309, at 189. The presence of even one expert, however, should be sufficient to screen erroneous information. Moreover, it is unlikely that the two other Board members would have no familiarity with an area and therefore that collegial decision-making would be prevented entirely.

Another limitation is that there can be a mismatch between the Board's expertise and the issues placed before the PBOI. In the Aspartame case, for example, Board members were chosen because of their expertise concerning neuro-toxicity. After the Board members were chosen, FDA determined that it had to ask the PBOI to investigate an issue that required a different type of expertise.[414] A PBOI, however, should be able to minimize this problem by the use of consultants who have the necessary expertise.[415]

A final limitation is that the Commissioner may not appreciate the full extent of the debate that occurs during a PBOI hearing from the post-hearing documents submitted by the parties or from other parts of the hearing record. Since the quality of this debate is one of the important advantages of a PBOI, the Commissioner could consider attending the hearing itself. In this way, the Commisioner could ask questions, take part in any dialogue that occurred, and gain a a more vivid impression of the the issues.[416]

The Commissioner might be reluctant to attend a PBOI because of its length. The Aspartame hearing lasted three days and the Depo-Provera hearing lasted five days. An alternative would be to provide an opportunity for direct communication between the Board and the Commission upon submission of the final decision.

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[413] See supra notes 292-296 and accompanying text (recommendation that FDA establish criteria for choice of PBOI).

[414] The Board was asked to determine whether rats who were fed Aspartame developed brain tumors as a result. Aspartame PBOI Decision, supra note 199, at 39. The Commissioner overruled the Board concerning their conclusions about the rat studies. See supra notes 212-219 and accompanying text. Since the Commissioner found that some of the Board's conclusions concerning the rat studies contained methodological errors, see supra notes 215-219 and accompanying text, the Board was probably hampered by its lack of expertise. See Peck, Comment, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 208-09 (J. Nuhart & M. Carrow, eds. 1983).

[415] See 21 C.F.R. §13.3(f) (1985) (Board's authority to consult with experts).

[416] See Merrill interview, supra note 346.

The time commitment problem might also be addressed by changing the nature of the PBOI. FDA's rules currently provide that a party entitled to a formal hearing can request instead a hearing before the Commissioner.[417] The Commissioner could appoint independent scientists to assist him in the hearing process including the preparation of his decision. This combination of the PBOI process and the Commissioner's final decision should be more efficient because it would eliminate one step in the hearing process, it would decrease many of the administrative burdens that have delayed the PBOI process,[418] and it would invite a collegial dialogue between the Commissioner and independent, expert scientists concerning the necessary decisions.

b. Flexibility of the Process

The PBOI is flexible in two ways. First, the Board "may consult with any person who it concludes may have information or views relevant to the issues" during a hearing.[419] Second, the Board may call a second hearing "if the Chairman concludes that it is needed to fully and fairly present information that cannot otherwise adequately be considered and to properly resolve the issues."[420]

These features allow the Board to respond to the fact that new scientific evidence often develops during the hearing process. This happened in the Aspartame case when a study suggesting that Aspartame had neurotoxic properties was finished after FDA had chosen the members of the PBOI. The Board solicited additional submissions of data becase these "new questions arose."[421]

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[417] 21 C.F.R. §§15.1-15.45 (1985).

[418] For example, the PBOIs were delayed in writing an initial decision because of the lack of any secretarial or administrative support from FDA. See infra notes 430-31 and accompanying text. The Boards also had difficulty finding and retreiving documents. See infra notes 432-34 and accompanying text. If the resources of the Commissioner's office were available to independent scientists who worked with the Commissioner, these problems should be alleviated.

[419] 21 C.F.R. at §13.4(f).

[420] Id. at §13.4(e).

These features also allow the PBOI to obtain additional information concerning issues that are not resolved in the first hearing. In the Depo-Provera case, for example, the Board was presented with evidence that two monkeys who were given Depo-Provera developed carcinomas in a location where such tumors were not known to occur spontaneously. The unusual location of the tumors therefore suggested that their development was related to the drug. This inference was contradicted by testimony that another study had also found a spontaneous tumor in that unusual location.[422] After the first hearing was completed, the Board felt that they could not reach a decision unless they could determine the validity of that study. As a result, the Board invoked the previous procedures. They hired a group of pathologists as consultants for the purpose of verifying whether the tumor in the other study was of the same type in the same location. The Board scheduled a second hearing to receive the report of the pathologists.[423]

c. Open Nature of the Process

The democractic character of the PBOI is the last advantage. In the Depo-Provera hearing, for example, over forty persons appeared to make presentations. These included representatives of the World Health Organization, the International Planned Parenthood Federation, the U.S. Agency for International Development, the Women's National Health Network, the Health Research Group, the Institute for the Study of Medical Ethics, and the American College of Obstetricians and Gynecologists. By comparsion, there were only a few nonparty participants in the Aspartame proceeding, but they included scientists who voluntarily appeared because of their interest and expertise in the matter.[424] Based on FDA's experiences, the PBOI appears to be a better forum for the participation of multiple parties than advisory committees or formal hearings.

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[421] See PBOI Report, supra note 244, at 3; supra note 414 and accompanying text.

[422] See PBOI Report, supra note 244, at 31-32.

[423] Id. at 32; see Depo-Provera Sterile Aqueous Suspension: Time and Place of Second Hearing, 48 Fed. Reg. 31910 (1983); Stribling interview, supra note 152.

[424] See supra notes 181, 253 and accompanying text.

FDA rules provide that any interested person may appear and make a presentation before an advisory committee, a formal hearing, or a PBOI.[425] The informality of the PBOI, however, is better suited to receiving input from scientists and others than a formal hearing. There is no necessity that a person have a lawyer and the nonlegal nature of the hearing is less intimidating.[426] Moreover, unlike a short advisory committee meeting,[427] the PBOI process can be long enough that even large numbers of participants can be accommodated if necessary. The PBOI process is also more likely to attract public attention since it occurs after FDA has reached a decision on a product and after FDA has agreed to subject its decision to PBOI scruntiny.

3. The Post-Hearing Process

The strength of the PBOI process is the quality, flexibility, and open nature of scientific deliberations. The next stage in the process, the post-hearing procedures, will significantly affect the ultimate usefulness of those advantages. This section evaluate this last stage of the process.

The post-hearing process consists of an initial decision by the PBOI and a final decision by the Commissioner. Three areas of this stage require evaluation. These concern the time delay that occurred, the Board's inattention to traditional legal procedures, and whether the Commissioner used the appropriate standard of review in the Aspartame case.

a. Time Delays

The production of the initial decision was a source of delay in the PBOI process. The following chart indicates the time periods between the start of the PBOI hearing, the date of the initial decision, and the date of the Commissioner's decision (in the Aspartame case):[428]

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[425] 21 C.F.R. §§12.4, 13.5(a) (1985); USE OF STANDING COMMITTEES, supra note 102, at 103.

[426] See supra note 399 and accompanying text.

[427] See supra note 387 and accompanying text.

[428] PBOI Report, supra note 244 at 15; Commissioner's Final Decision, supra note 178, at 38,286.

Time Delays

	Depo-Provera	Aspartame
Date hearing started	January, 1983	January, 1980
Date of Initial Decision	October, 1984	October, 1980
Time Elasped	21 months	9 months
Date of Final Decision		July, 1981
Total Time Elapsed		18 months

The chart highlights the fact that the Depo-Provera Board took a considerably longer time (twenty-one months) to produce an initial decision than did the Aspartame Board (nine months). Nevertheless, Searle regarded that delay as inappropriate. Shortly before the Board issued its decision, the company had filed a law suit to attempt to force the Board to complete the decision.[429]

The time delays were generally caused by four factors. Board members had full-time positions with other time-consuming responsibilities. Further, with one exception, they did not have anyone to assist them in the preparation of the decision. In Depo-Provera, the chairperson did have the assistance of a graduate student from her institution.[430] The Board was also hampered by the fact its members were located in different communities and, as a result, could only meet sporadically.[431]

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[429] Interview with Robert Becker and Peter Safir, in Washington, D.C. (June 25, 1985).

[430] PBOI Report, supra note 244, at 5. This time problem is aggravated by the fact that the type of high quality scientists that FDA seeks for the Board are especially busy. Cf. supra notes 341-44 and accompanying text (Scientists unwilling to serve on PBOIs because of time constraints).

The process was also slowed by the difficulty that the PBOIs had in finding documents. The chairperson of the Depo-Provera Board has noted that this aspect of the process was a "nightmare."[432] Documents are filed by FDA in the order in which they are sent to the agency. Although each is given a number, the agency has no cataloging system or other means by which documents can be efficiently located. As a result, a PBOI can not be certain that it has reviewed all of the documents pertaining to any particular issue except by going through all of the documents filed in a hearing. In the case of Depo-Provera, there were thousands of such documents.[433] Moreover, the search for a specific document can also be time-consuming. For example, the Depo-Provera Board found that FDA had no index of advisory committee minutes. The Board therefore had to go through all of the minutes filed by a committee to locate the ones pertinant to their hearing.[434]

Besides the previous problems, the time delay in the Depo-Provera case had three additional causes. The Depo-Provera Board was asked to decide a more extensive set of issues.[435] Moreover, the Depo-Provera case had been under consideration by FDA for over eighteen years before the Board was convened.[436] As a result, the Board had to master a more extensive administrative record as well as an extensive scientific literature concerning the drug. For example, the Board reported that:

> In September, 1983, when we began, the documents in the administrative record in this matter occupied approximately 45 linear feet of shelf space. At the

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[431] PBOI Report, supra note 244, at 5.

[432] Judith Weisz interview, supra note 391.

[433] See infra note 437 and accompanying text.

[434] Judith Weisz interview, supra note 391.

[435] Compare supra notes 275-278 and accompanying text (Depo-Provera issues) with supra note 186 and accompanying text (Aspartame charges).

[436] See supra notes 243-247 and accompanying text.

> time of the submission of our report, the documents occupy approximately 54 linear feet.[437]

The extensive nature of the case is reflected in the length of the initial decision which is nearly 200 pages long. By comparison, the Aspartame initial decision is 50 pages in length.[438] The other factor that affected the Depo-Provera Board was the serious illness of one of the Board members. As a result, this person was unable to assist in the actual writing of the report.[439]

Because of the previous factors, the time delay in the Aspartame case may be more indicative of the length of time future PBOIs will need to write their decisions. Moreover, FDA can take several steps to speed the process. The most important change would be to authorize Board members to hire graduate students or others to serve the same function as law clerks serve for an ALJ or judge. FDA could also offer the Board clerical support or authorize Board members to acquire the necessary assistance at their locations. The Board could also require participants to file pre-hearing briefs, written statements of their testimony, and a joint appendix listing the documents uopn which they relied. These and similar requirements could assist the Board in organizing the issues and evidence.[440] Further, FDA could institute record management procedures that would allow better access of documents. Finally, the Board's legal advisor, who is a FDA attorney, might take a more active role in helping the Board formulate its report including the preparation of drafts of some sections of it under the Board's supervision.[441]

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[437] PBOI Report, _supra_ note 244, at 4.

[438] _See_ PBOI Report, _supra_ note 244; Aspartame PBOI Decision, _supra_ note 199. The Aspartame decision, however, is insufficiently documented. _See_ _infra_ note 445 and accompanying text.

[439] PBOI Report, _supra_ note 244, at 5, 181.

[440] _See_ Copp and Campbell interviews, _supra_ note 150. Rothstein interview, _supra_ note 340.

Even if FDA makes the previous improvements, the use of a PBOI may cause some delay. Consequently, FDA should include the potential time delay as one of the factors it establishes to determine whether or not to grant a request for a PBOI.[442] FDA should also consider whether a case presents so many issues for resolution that, like the Depo-Provera matter, it will be unwieldy.[443] A prior section recommended that FDA should publish the criteria it uses to evaluate requests for a PBOI.

b. Inattention To Traditional Procedures

Some of the actions of the Aspartame PBOI have been criticized for their disregard of traditional legal procedures.[444]

The most significant oversight by the Aspartame Board was its failure to use any citations in its initial decisions.[445] No one at FDA anticipated that the Board would issue a decision without footnotes and the Board on its own did not consider the footnotes to be necessary.[446] FDA corrected this problem by the time of the Depo-Provera initial decision.

Professor Brannigan has argued that another problem is the the absence of an "appropriate, usable record for the proceeding." He contends that although "the office of the hearing clerk [at FDA] maintains a reasonably efficient, cumulative record of the entire proceeding . . . it is impossible to determine what portion of the 162 volumes constitutes the hearing record." He contrasts this situation to his experiences with adjudicatory hearings at the Consumer Product Safety Commission where "an appropriate, usable record was made and preserved."[447]

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[441] The attorneys who advised the Boards apparently played only a very limited role in the creation of the initial decisions. The decisions themselves were written entirely by the Boards; Stribling interview, supra note 152; Rothstein interview, supra note 340.

[442] See supra note 292-96 and accompanying text (recommendation that FDA establish criteria for choice of PBOI).

[443] Id.

[444] See, e.g., Brannigan, supra note 309, at 194-95, 199-200; Buc, supra note 319, at 205.

[445] See Aspartame PBOI Decision, supra note 199.

[446] Rothstein interview, supra note 340.

This criticism, however, overlooks the fact that FDA establishes the same type of record for both a PBOI and a formal evidentiary hearing. The record for a PBOI consists of all Federal Register notices, all written submissions, the transcripts of all hearings, and the initial decision, including the documents it cites in support of its conclusions. The significant elements of a record for a formal hearing consist of all of the previous documents and any other documentary evidence submitted during the hearing.[448] Professor Brannigan also objects that FDA failed to offer any explanation why witnesses were not under oath, that the slides used by some witnesses with their testimony were not made part of the record, and that two Board members visited the Searle laboratories after the hearing was over for the purpose of personally viewing tissue samples stored there.[449] Concerning the last event, Brannigan points out that whatever the Board members observed during their visit "is not evidence of record unless their observations, as expressed in the [initial decision] are evidence."[450]

FDA should easily be able to remedy Professor Brannigan's complaints. Witnesses should be required to take oaths, copies of slides used by witnesses should be included in the record, and Board members should be required to summarize their findings concerning any on-site visit for inclusion into the record before it is closed. These changes would make the process more accountable and would not change the process in any significant manner.

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[447] *Id.* at 199-200.

[448] *Compare* 21 C.F.R. at §13.4 (POBI record) *with id.* §§12.94, 12.100 (formal hearing reocrd). Because of its informal nature, the PBOI does not include any procedure by which the Board rules on the admissibility of evidence. *See supra* notes 18-22 and accompanying text.

[449] Brannigan, *supra* note 309, at 194-95.

[450] *Id.* at 195.

Professor Brannigan and others, however, may not be satisfied even if the previous changes are made. Their objection to the PBOI process appears to be that it does not include all of the procedures used in a formal evidentiary hearing. Thus, critics have objected to the lack of an opportunity for cross-examination.[451] Similarly, Professor Brannigan objects that members of the PBOI engaged in a on-site inspection without the presence of the participants in the hearing process.[452] These criticisms, however, fail to distinguish between the two models used to obtain scientific input.[453] As previously noted, when scientific specialists are employed, the traditional procedures of a formal hearing process are less necessary.[454] Accuracy is promoted because of their familiarity with the specific subject matter area and the particular controversy being resolved, and this is the reason the Board members are selected for participation.

Even if the procedural requirements of a formal hearing process were applied, the PBOI process would still be different. When scientific specialists are employed, they bring to the hearing process their own knowledge about a matter. Since there is no way of knowing all the information which the Board members have about a subject, their knowledge can not be completely subjected to an adversarial process. This fact accounts for Professor Brannigan's confusion whether the "observations" of Board members can be regarded as "evidence."[455] The knowledge of Board members is not "evidence" because the PBOI is not a formal hearing process where decisions are to be made on a closed record.[456] Moreover, because of the fact that the scientists bring knowledge to the process, it is not possible to restrict decisions to a closed record.

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[451] See supra notes 404-406 and accompanying text.

[452] See supra note 450 and accompanying text.

[453] See supra § IID2.

[454] See supra note 409 and accompanying text.

[455] See supra note 447 and accompanying text.

[456] See supra note 18-21 and accompanying text.

c. Appropriate Standard Of Review

The final question raised about this stage of the process is what should be the Commissioner's scope of review for a PBOI decision. If an agency and an ALJ disagree with respect to a finding of fact, it is the agency's finding that is due deference on judicial review. The ALJ's findings are only a part of the record to be considered by a reviewing court in determining whether the agency's finding is supported by the record as a whole.[457]

Some commentators, however, have suggested that the special status of the PBOI may require different treatment.[458] They argue that "the entire rationale for convening a board of experts collapses if their opinion carries no more weight than that of an administrative law judge"[459] and that "if an expert advisory group, such as the board, is only given lip service, then utilization of the board becomes merely a wasteful step in a repetitious process of regulation."[460] Further, the lack of deference might discourage scientists from accepting appointments to the Board. Accordingly, commentators propose that the Board's conclusions be given "the status of a jury finding, to be overturned only if no reasonable person could agree with the panel"[461] or that the "factual determinations of the Board should . . . have a presumption of validity with a clear error standard of review."[462]

These suggestions, while meritorious, raise a problem. Congress has given the Commissioner the responsibility to implement the FDCA. This makes the Commissioner legally and politically responsible for the agency's actions. As a result, he should be free to reach different judgments than the POBI if he can defend the result as being reasonable. Otherwise, the Commissioner has the responsibility, but not the practical authority, to make decisions for the agency.

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[457] R. PIERCE, S. SHAPIRO & P. VERKUIL, supra note 7, § 7.3 at 358, § 9.3.6. at 504.

[458] Brannigan, supra note 309, at 197-99; FDA's Public Board of Inquiry, supra note 311, at 646-48.

[459] Brannigan, supra note 309, at 198.

[460] FDA's Public Board of Inquiry, supra note 311, at 647.

[461] Brannigan, supra note 309, at 198.

[462] FDA's Public Board of Inquiry, supra note 311, at 647.

Because of the previous problem, the Commissioner should not be required to give deference to the decisions of a PBOI. Nevertheless, it is unlikely that the Commissioner will give only "lip service" to the scientific judgments of a PBOI. As a practical matter, the Board's scientific judgments will normally receive deference. In most cases, the Commissioner will be influenced to follow the Board's recommendations by the scientific reputation of the Board members, by the fact that they have specific expertise concerning the matters in dispute, by the quality of their explanation of their conclusions, and by the recognition that the integrity of the PBOI process will be affected by how he treats the Board's conclusions.[463]

Further, even if the Commissioner does not give deference to the Board's conclusions, the entire rational of the PBOI does not "collapse." One important advantage of the PBOI process is that it produces a hearing record that more fully and expertly delineates the issues to be decided.[464] As a result, the PBOI contributes to the decision-making process by assisting the Commissioner to appreciate the nature of the scientific issues that must be resolved. In cases with significant and difficult issues of scientific judgment, this is a significant aspect of the PBOI process.

Finally, the Commissioner could establish a procedural rule that required any final decision by him to explain why FDA had rejected the scientific judgment of a PBOI in light of the Panel's expertise and specific knowledge of the subject. For example, in the Aspartame case, the Commissioner rejected the Board's determination that the incidence of tumors in a control group of rats was inconsistent with the incidence of tumors that the scientific literature revealed would spontaneously occur in that type of rate species.[465] The Commissioner held that the Board's interpretation was an unjustified interpretation of that scientific literature.[466] Thus, the Commissioner reversed the Board because of a difference of opinion and he did not give any deference to the Board's judgment over his own. The Board, however, had no special expertise concerning the scientific literature. As explained previously,[467] the Board members were chosen because of their expertise concerning neuro-toxicity. After they were chosen, FDA determined that it had to ask the PBOI to investigate whether Aspartame caused brain tumors, which was an issue that required a type of expertise outside of the experience and background of the Board.[468] In this circumstance, the Commissioner should have explained that because of this mismatch between the dispute and the Board's expertise, no deference to their judgment was appropriate.

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[463] *Cf*. R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 7, at §7.5 (degree of deference given by federal courts varies as a practical matter with court's judgment whether deference is warranted by agency's expertise, actions, and explanations.)

[464] *See supra* note 325 and accompanying text.

[465] *See supra* notes 218-219 and accompanying text.

Considered in its entirety, the post-hearing process has the potential to work effectively. The Depo-Provera initial opinion indicates that PBOIs can produce decisions that exhaustively and rigorously consider the relevant issues. Furthermore, with the exception of the time it takes to produce initial decisions, there are no significant problems with this stage of the process. The problem of time delay, which was so significant in Depo-Provera, may have been atypical. Moreover, there are several steps that FDA can take to speed this stage of the process.

IV. THE FUTURE OF THE PBOI TYPE OF PROCESS

There has been considerable interest in FDA's experiences because the PBOI differs from the traditional means by which scientific input is obtained.[469] This section argues that FDA's experiences justify further experimentation with a PBOI type of process, both at FDA and at other agencies.

A. The PBOI Type of Processs at FDA

FDA's experiences with the PBOI confirm the validity of the "science court" idea for the determination of issues of scientific judgment.[470] The reason is that the scientific seminar format of the PBOI is more conducive to producing good scientific analysis and debate. A similar conclusion was suggested at a conference sponsored by the National Center for Administrative Justice.[471] The study found that techniques like the PBOI were more effective than traditional adversarial hearings because scientists had more flexibility to operate according to scientific methods:

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[466] Id.

[467] See supra note 414 and accompanying text.

[468] Id.

[469] See supra notes 124-127 and accompanying text.

> Scientists and technologists should have room to breathe in carrying out their agreed functions, that is, scientific or technical data should be gathered, developed, evaluated, and presented in a form and manner acceptable to the presenter and his or her peers. . . . [R]oom to breathe . . . is a concept that seems to capture the need for science, done by scientists, in modes acceptable to science, as a routine component of better regulatory processes.[472]

The results in Part II, however, also suggest another conclusion. The costs of merging the PBOI and the regulatory process will limit its use as a practical matter. The two PBOIs did produce the type of scientific inquiry in the hearing stage that FDA anticipated.[473] But there were delays and other problems in the pre- and post-hearing stages that were related to the need to fold the PBOI into the normal regulatory process.[474] Although many of these can be alleviated, the PBOI will continue to be an expensive process. As a result, it will only be cost-effective in cases where there are significant issues of scientific judgment and the issues are of great public significance. In those cases, the benefits of the PBOI in terms of enhanced accuracy and legitimacy are likely to outweigh the costs of the process.

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[470] See supra notes 322-30 and accompanying text.

[471] Nyhart & Carrow, Toward Better Resolution of Regulatory Issues Involving Science and Techology, in LAW & SCIENCE IN COLLABORATION 255, 288 (J. Nyhart & M. Carrow, eds. 1983).

[472] Id.

[473] See supra notes 378-380 and accompanying text.

[474] See supra notes 332-36, 425-39 and accompanying text.

Even if the use of the PBOI is limited, it offers FDA a unique option. Part II found the PBOI had several important advantages over the agency's advisory committee system.[475] One key difference is that the PBOI comes after the time FDA has reached a decision concerning whether to license a new drug or food additive. Because the PBOI can focus on the key issues in FDA's decision, it can serve as an independent check concerning the validity of that decision. Another key difference is that the PBOI focusses to a greater extent on the analysis of data and is more accountable for the conclusions it reaches. As a result, the accuracy and legitimacy of FDA's decision making process is enhanced by the PBOI process.[476] Further, because of its timing, the PBOI has the potential to create a scientific consensus on behalf of FDA's decision or a modification of it.[477]

Although use of the PBOI may be preferable to use of advisory committees in appropriate cases, FDA should also strengthen the advisory committee system. Advisory committees should be constituted with the features of the PBOI that were responsible for the quality of the deliberations of that process. FDA should require that advisory committees write a decision reflecting their deliberations which includes an analysis of the data considered.[478] Further, advisory committee members should be encouraged to organize the format of the hearings that occur before them, to read and analyze the information relevant to their meetings in advance, to committ additional time to extend the length of advisory committee meetings, and to make greater use of consultants to acquire additional expertise as necessary.[479] FDA might wish to limit these more elaborate methods of consultation to cases involving significant and difficult issues of scientific judgment.

If these improvements were made, FDA would gain two advantages. First, there would be less reason to convene a PBOI because advisory committees and the PBOI would be more similar in the type of output they produced. As a result, FDA could avoid use of the more expensive PBOI system to obtain expert advice.

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[475] See supra notes 384-89 and accompanying text.

[476] See supra notes 325-28 and accompanying text.

[477] See supra notes 153-54 and accompanying text.

[478] See supra note 390 and accompanying text.

[479] See supra note 386 and accompanying text.

Second, any subsequent hearing process should also be more efficient because the results of advisory committee deliberations would be available in a form more suitable for use and analysis by litigants. At the moment, use of advisory committee deliberations are hampered by they method by which they are reported.[480]

Finally, FDA should consider whether the format of the PBOI process could be changed to maximize its advantages and minimize its disadvantages. For example, instead of the current PBOI, persons entitled to a hearing, could be offered the option of a scientific seminar hearing before the Commissioner that included the participation of independent scientists.[481] This change would be more efficient because it would eliminate one step in the hearing process and it would eliminate many of the administrative burdens that slowed the PBOI process.[482] At the same time, it would also allow FDA to obtain independent expert advice in a manner that would increase the accuracy and legitimacy of the decision-making process.

B. The PBOI at Other Agencies

On the basis of FDA's experiences, other agencies should consider use of the PBOI process. There are four reasons that suggest they could benefit as a result. First, agencies such as EPA, OSHA, and CPSC consider the same types of scientific evidence as FDA to determine if chemicals are "safe."[483] They therefore make the same type of scientific judgments about the validity of animal, clinical, or epidemiological evidence.[484]

Second, other than the PBOI, the other agencies are in a comparable position to FDA concerning their options to obtain independent scientific input. Health and safety agencies can seek

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470. See supra note 391 and accompanying text.

481. See supra notes 417-181 and accompanying text.

482. See supra note 418.

483. See supra notes 26-28 and accompanying text.

484. See supra § 2B.

scientific input trough a hearing process, which is typically a form of rulemaking,[485] or through advisory committees.[486]

Third, agencies could utilize the PBOI process in almost the same fashion as FDA. To adapt the process to rulemaking, an agency could create a PBOI to hear issues relevant to the rulemaking proceeding. The record of the proceeding, including the written opinion of the Board, would become part of the rulemaking record. After the PBOI was completed, interested parties could place their responses into the record in rebuttal or support of the PBOI decision.[487]

Fourth, the PBOI should offer other agencies the same advantages that FDA obtained. The PBOI would be convened after the agency had published a proposed rule. The PBOI therefore would have the advantage over an advisory committee of addressing the specific issues created by the proposed rule under a format that was more productive than many advisory committee meetings.[488] The PBOI process would also be more likely to produce a thorough debate of the scientific issues than the rulemaking process, since scientists could act in a scientific manner.[489] Further, the PBOI process would increase the legitimacy of decision-making by subjecting the proposed rule to independent scrutiny.[490] Finally, the PBOI could serve as a vehicle to create a scientific consensus for the agency's proposed rule or some variation of it.[491]

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[485] _See supra_ note 70 and accompanying text.

[486] _See supra_ notes 102-111 and accompanying text.

[487] _See supra_ note 70 and accompanying text (description of FDA process). If the agency was required to hold a hearing as part of hybrid rulemaking, _see supra_ notes 68-81 and accompanying text, the PBOI could serve as a substitute or to augment the hearing.

[488] _See_ Ashford, _supra_ note 471, at 166; _supra_ notes 471-72 and accompanying text.

[489] _Id._

[490] _See supra_ notes 328-30 and accompanying text.

OSHA's experience supports the previous conclusion that agencies would be advantaged if they used a PBOI process concerning difficult questions of scientific judgment.[492] In 1980, after a conventional rulemaking proceeding, OSHA adopted a generic cancer policy that specified the regulatory actions the agency would take if a substance was classified as a carcinogen.[493] One of the agency's purposes was to "precipitate a full-scale public shootout . . . in which interested parties could aid the agency in forging a policy that could serve as a model for all other government agencies."[494] The rule, however, "produced a cascade of opposition that was reflected not only in the [court] challenges but in efforts in Congress and the executive branch . . . to effect changes."[495] The rule has been withdrawn by OSHA on the ground it was incompatable with a Supreme Court interpretation of OSHA's powers.[496]

OSHA's unfavorable experience resulted in part because it was attempting to "define scientific parameters about which there remained wide dispute within the scientific community at large and certainly within the affected communities regulated by

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[491] *Id.*

[492] Merrill, *Comment*, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 105 (J. Nyhart and M. Carrow, eds. 1983).

[493] *See* Occupational Safety and Health Administration, Identification, Classification and Regulation of Potentital Occupational Carcinogens, 45 Fed. Reg. 5002 (1980) (final rule); Indentification, Classification and Regulation of Toxic Substances Posing a Poentential Occupational Carcinogenic Risk, 41 Fed. Reg. 54147 (1977) (proposed rule).

[494] McGarity, *OSHA's Generic Carcinogen Policy: Rulemaking under Scientific and Legal Uncertainty*, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 79 (J. Nyhart & M. Carrow, eds. 1983).

[495] Merrill, *supra* note 492 at 105.

[496] Schroeder & Shapiro, *supra* note 29, at 1261-62.

OSHA."[497] The agency's reliance on traditional informal rulemaking procedures in those circumstances may have doomed its efforts. The report for the National Center for Adinistrative Justice concluded:

> The OSHA GCP rulemaking . . . was not . . . a shootout of science. . . Any departures from the standard model of [traditional quasi-formal rulemaking] tended to be in the direction of judicialization rather than in the direction of more informal attempts to invite the participation of scientists and facilitate the resolution of scientific issues. [No] effective shootout of science--an effective consensus gathering and evaluating of known science--has been held and fed into the GCP rule making.[498]

Although the PBOI offers agencies the type of advantages FDA obtained, other agencies would also have some of the same problems encountered by FDA. These would include the time necessary to recruit Board members and to have them write a "decision" that could be placed in the rulemaking record.[499] These agencies, however, would also have a comparative advantage. Since the PBOI would not be responsible for writing a decision that replaced the initial decision of an ALJ,[500] these other agencies could limit the scope of the issues to be decided by the Board to important questions of scientific judgment. As a result, the PBOI might be more cost-effective in the rulemaking context.

If other agencies choose not to adopt a PBOI process, FDA's experiences with the PBOI are still relevant. The PBOI process confirms the advantage of obtaining expert scientific advice in a setting in which scientists are comfortable to debate and act. This result suggests that health and safety agencies should continue to rely on the use of advisory committees and should adopt the key elements of the PBOI process for those committees.[501] The most important of those elements is that advisory committees should be required to report their conclusions in an accountable format that indicates the exact nature of the scientific judgments that were made.[502]

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[497] Merrill, supra note 492, at 108.

[498] Nyhart & Carrow, supra note 471, at 290.

[499] See supra §§ IIIC1a & IIIC3a.

[500] See supra note 16 and accompanying text.

C. Conclusion

The design of hearing procedures for the resolution of scientific disputes has been a signficant issue for the administrative process in the last two decades. One fundamental change has already occurred. Hybrid hearing has become the norm for the determination of such issues.[503] Another fundamental change may be on the horizon. The PBOI process differs from other methods to obtain scientific input in three significant ways.[504] First, unlike advisory committees, the PBOI has decision-making responsibility. Second, unlike most other hearing boards which utilize scientists, the members of the PBOI are not agency employees. Third, the PBOI uses an informal hearing process. These changes result from recognition that a determination whether a chemical is safe often requires difficult scientific, as well as regulatory, judgments.[505] The PBOI process was analyzed to determine whether a "scientific" or "adversarial" process is better for the resolution of issues of scientific judgment.

The results are mixed. FDA's experience does indicate that the PBOI has the potential to be more effective, but at a higher price than the conventional process. As a result, the PBOI is unlikely to be cost-effective except when it is used for significant issues of scientific judgment in which the public has a important interest.

No one should be surprised that the PBOI was not an unqualified success. The use of the PBOI, or any similar scientific seminar type of process, has to be folded into the normal, adversarial regulatory process. Problems are bound to arise when two such different methods of decision making are integrated.

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[501] See supra notes 468-469 and accompanying text.

[502] See supra note 468 and accompanying text.

[503] See supra note 70 and accompanying text.

[504] See supra note 124.

[505] See supra § 2B.

Because of the problems that occurred, many lawyers remain dubious about the merits of the PBOI. They object to the lack of adversarial procedures[506] and they believe the PBOI costs too much for the value of the input that is received.[507] While these doubts have to be carefully considered, FDA's experiences seem to contradict them. Scientists, working in a scientific environment, can be particularly effective concerning the resolution of scientific questions.[508] Further, the PBOI process is only part of the regulatory process. As a result, the agency still retains the right and responsibility to make the final decisions. Moreover, the agency's decision is made according to the traditional adversarial procedures that apply to it.[509] As a result, the PBOI process appears to be a useful compromise: it allows scientists sufficient room to operate in an effective manner, but it does not alter the ultimate method of agency decision-making.

The experience with the PBOI to date justifies continued experimentation at FDA and at other agencies. The potential of the PBOI has been demonstrated, but its ultimate worth remains to be determined. Further experimentation would create a better record from which costs and benefits could be calculated. At a time when health and safety agencies face ever more difficult questions of scientific judgment, the PBOI may turn out to be an important improvement in the administrative process.

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[506] *See*, *e.g.*, *supra* notes 404-61 and accompanying text.

[507] *See*, *e.g.*, *supra* notes 372-75 and accompanying text.

[508] *See* *supra* notes 397-403 and accompanying text.

[509] *See* 21 C.F.R. § 12.125 (1985); *see* *supra* note 21 and accompanying text.

LISTING OF CONCLUSIONS

A. Scientific Issues and Scientific Advice

1. The implementation of health and safety regulations often requires an evaluation of the scientific reliability of animal, clinical, or epidemiological testing data. The quality and legitimacy of these evaluations can be improved by consultations with scientific experts outside of the government. Advisory committees are the most common method of consultation. The Public Board of Inquiry Process (PBOI) at the Food and Drug Administration (FDA) is an innovative attempt to develop an additional method of consultation. Because of the importance of maintaining a dialogue with the scientific community, agencies should evaluate how existing methods of consultation can be improved.

2. Consultation procedures should be arranged to allow scientists to gather, develop, evaluate, and present data in a form and manner acceptable to the general scientific community. At the same time, scientific advice should be obtained in an accountable manner. Since this advice is often based on judgments about which reasonable scientists will disagree, consultants should be required to specify in writing the data on which their interpretations are based and why those interpretations were chosen.

3. Agencies should consider whether a consultation process with independent experts should be part of the regulatory hearing process. In this assessment, FDA's experiences with the PBOI should be considered. This assessment should determine whether consultations during the hearing process would improve the accuracy and legitimacy of regulatory decisions and whether the potential costs of such consultations, such as any delays that would occur, would outweigh potential benefits.

B. The Food and Drug Administration

4. FDA should consider how the agency can improve the methods by which it obtains independent scientific advice in light of its experiences with the PBOI process. This evaluation should consider both the effectiveness of the agency's advisory committee system and the PBOI.

5. FDA should consider whether improvements in its current advisory committee system would obviate the necessity of consulting independent experts as part of the hearing process through procedures such as the PBOI. This assessment should consider whether the format of advisory committee consultations can be improved by adoption of some of the PBOI procedures. Those procedures would include the ability of advisory committees to organize the format of the

hearings that occur before them, the appointment of advisory committee members with the responsibility of assimilating the relevant scientific data, and the requirement that committees issue written decisions that specify the nature of the analysis in which they engaged. The agency should also consider whether these more elaborate methods of consultation should be used only for certain advisory committee deliberations of special interest and importance to the agency.

6. FDA should consider what improvements would make the PBOI process more fair and efficient. This assessment should consider the adoption of the following changes:

a. the promulgation of criteria by which the agency would determine whether or not to grant a request for a PBOI or any other alternative hearing process;
b. the appointment of a chairperson, the choice of which is within the Commissioner's discretion at the start of the PBOI hearing process;
c. the selection of the second Board member from the nominations of those persons supporting the agency's decision and the selection of the third Board member from those opposing FDA's actions;
d. the use of "charges" or questions for the PBOI that require a judgment about the probability that a product might be harmful in some manner;
e. the greater reliance on government scientists as Board members to avoid conflict-of-interest problems;
f. the required use of a prehearing conference;
g. the provision of greater administrative support for Board members;
h. and stricter adherence to procedures intended to ensure that the administrative record is complete and usable for successive stages of the administrative and legal process.

7. FDA should also consider whether the existing PBOI process could be replaced by an alternative that is more efficient. Alternatives that FDA might consider include the option that persons entitled to a formal hearing could request a hearing before the Commissioner that included the participation of independent scientists. FDA should determine whether these types of alternative formats offer the same advantages as the PBOI process at less cost and delay.

C. Other Health and Safety Agencies

8. Health and safety agencies that evaluate scientific evidence should consider how they can improve the methods by which independent scientific advice is obtained. This evaluation should consider both the effectiveness of

advisory committee systems and the possibility of adopting a PBOI type of process.

9. Agencies should consider whether the current format of advisory committee consultations could be improved by adoption of some of the PBOI procedures used by FDA. Those procedures would include the ability of advisory committees to organize the format of the hearings that occur before them, the appointment of advisory committee members with the responsibility of assimilating the relevant scientific data, and the requirement that committees issue written decisions that specify the nature of the analysis in which they engaged. The agency should also consider whether these more elaborate methods of consultation should be used only for certain advisory committee deliberations of special interest and importance to the agency.

10. Agencies should also consider whether to adopt a PBOI type of process as part of their rulemaking procedures. The record of any such proceeding, including the written opinion of the Board, would become part of the rulemaking record. Parties would be free to comment in support or opposition to the recommendations of the PBOI by filing comments with the agency for the rulemaking record.

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